



THE CONSTITUTIONAL REBUILDING
OF THE
SOUTH AFRICAN PRIVATE LAW

A Choice Between Judicial and Legislative Law-Making

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DECLARATION

This dissertation is the result of my own work and includes nothing that is the outcome of work done in collaboration. I further declare that this dissertation — including any part of this dissertation — is not substantially the same as any other work that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other university or similar institution.

Parts of this dissertation — which constitute no more than three per cent of the total word count — adapts analysis contained in two journal articles for which I was the sole author. The dissertation declares in the footnotes those parts that rely upon my prior academic writing in:

- Curbing the Constitutional Development of Contract Law (2014) *South African Law Journal*; and
- The Negative Obligation of the Housing Right (2013) *South African Journal on Human Rights*.

This dissertation contains 99,844 words (79,583 excluding footnotes)* and thus does not exceed the prescribed word limit set by the Law Degree Committee.

Michael Dafei

* The word count excludes the cover page, declaration, acknowledgments, table of contents, abstract, table of figures, list of abbreviations, opening quote, postscript, and bibliography.

For all those who've nudged me forward

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ABSTRACT

A tension arises whenever the South African private law fails to meet constitutional right norms. To remedy a deficiency, two law-making options are available. The first is for the judiciary to develop or change private law principles and rules in order to provide protection for the implicated constitutional norm. The second is for the judiciary to enforce an obligation upon Parliament to enact legislation to amend or replace existing private law rights and obligations so as to safeguard the norm against interference from a private individual or entity. The former is the more conventional option, but, in recent years, the law reports record an increasing reliance on the legislative duty to protect constitutional right norms in private legal relationships. The thesis investigates the extent to which the latter phenomenon — which will be described as a ‘pivot towards legislative remedies’ — exists, and the circumstances in which the courts pivot towards legislative remedies rather than developing private law of their own accord.

The thesis finds that legislative schemes that give effect to constitutional rights are likely to contain an array of benefits that are absent from or reduced in the judicial law-making process. The judicial pivot towards legislative remedies is thus a strategy to enhance the process through which conflicting rights are resolved, as it allows for the constitutional rebuilding of private law in a way that the judiciary is unable to do on its own. Importantly, however, theories of judicial deference do not explain the pivot. On the contrary, the courts have exercised a strict level of control over the legislative law-making pathway. Through either statutory interpretation or the review of legislation, the courts require legislation to contain the essentials of the judicial law-making framework. From this perspective, the judicial law-making process produces the floor of the rebuilding project and the legislative law-making process enhances that framework.

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LIST OF ABBREVIATIONS

AD	Appellate Division of the High Court of South Africa
ANC	African National Congress
court	Constitutional Court of South Africa
DP	Democratic Party (now the Democratic Alliance)
ERC	Equality Review Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDEA	International Institute for Democracy and Electoral Assistance
SACP	South African Communist Party
SALC	South African Law Commission (SA Law Reform Commission)
SCA	Supreme Court of Appeal of South Africa
UN	United Nations
UNHRC	UN Human Rights Committee
UNCESCR	UN Committee on Economic, Social and Cultural Rights

Referencing Abbreviations:

All SA	All South African Law Reports
BCLR	Butterworths Constitutional Law Reports
BverfGE	Decisions of the Federal Constitutional Court of the Federal Republic of Germany
CLR	Columbia Law Review
CPD	Decisions of the Cape Provincial Division
CUP	Cambridge University Press
EDL	Decisions of the Eastern District Court (Cape of Good Hope)
HUP	Harvard University Press
ICON	International Journal of Constitutional Law
MLR	Modern Law Review
OUP	Oxford University Press
PD	Decisions of the Supreme Court of Israel
SA	South African Law Reports
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SCR	Supreme Court Reports (Canada)
SLR	Stellenbosch Law Review
THRHR	Journal of Contemporary Roman-Dutch Law
TPD	Decisions of the Transvaal Provincial Division
TS	Decisions of the Transvaal Supreme Court
US	United States Reports
WLD	Decisions of the Witwatersrand Local Division

We are not dealing with a Constitution whose only or main function is to consolidate and entrench existing common law principles against future legislative invasion. Whatever function constitutions may serve in other countries, in ours it cannot be properly understood as acting simply as a limitation on governmental powers and actions. Given the divisions and injustices, it would be strange indeed if the massive inequalities in our society were somehow relegated to the realm of private law, in respect of which government could only intrude if it did not interfere with the vested individual property and privacy rights of the presently privileged classes.

That, to my mind, is not the issue.

The real issue, in my opinion, is how the Constitution intends fundamental rights in the broadest meaning of the term to be protected. More particularly, is the Constitution self-enforcing in all respects, or does it require legislative intervention in certain areas?

Sachs J, *Du Plessis* (abridged)

CHOOSING BETWEEN LAWMAKERS

This chapter introduces the law-rebuilding project of the South African Constitution, and proceeds to ask how the two primary law-making institutions — namely, the legislature and the judiciary — should relate to one another when rebuilding private law.

1 Travelling on an unfinished map

The preamble of the Constitution of the Republic of South Africa, 1996 (Constitution) speaks of the need to sail away from the ashes of apartheid to a society grounded upon ‘democratic values, social justice and fundamental rights’. The aim of the constitutional project, it was once famously proclaimed, is to breakaway from an oppressive and insular legal system.¹ The new legal order would preserve from the past only those parts that are defensible, and, as South Africa charts towards a democracy that encapsulates a culture of human rights and accountability, a new set of legal principles and institutions would be built.² The project is all encompassing. The policies of the apartheid government scorched virtually every aspect of the legal system. The Constitution therefore demands that all parts of the law are subject to review and rebuilding, including, perhaps most controversially, private law.³

¹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 261 (Mahomed J). See also *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 1.

² *Makwanyane* (n 1). See also *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC) para 21.

³ Constitution ss 8(2), 39(2), 172(1)(a), 173.

Two decades into the journey, our current coordinates are somewhat debatable. The country has made remarkable progress in certain areas. Notable victories include the abolition of the death penalty,⁴ the recognition of same-sex marriage,⁵ and the regular holding of democratic elections. In other areas, however, the pace remains stubbornly slow. The most recent national survey records that more than half of the population live in poverty, which is a statistic made even more alarming by the fact that South Africa is measured as one of the most economically unequal societies in the world.⁶ The transition to democratic rule has also failed to curb the prejudice and violence that characterised the apartheid state, the only difference today being that these acts appear more concentrated in the hands of private individuals. An additional challenge is the management of public resources. The financial reports of the state describe unacceptably high levels of mishandled public funds while corruption remains endemic in both the public and private sector.⁷

The transition away from authoritarian rule will always prove an arduous venture as an endless array of legal and political forces impel both the speed and trajectory of travel. Although many of these forces are difficult to identify or grasp fully, there is one prominent factor that is easy to discern from the law reports: the type of legal action needed to remedy a defective law. The tossing overboard of an indefensible rule is straightforward. It is easy, for instance, to delete a rule that criminalises consensual acts of sodomy.⁸ That discriminatory rule requires no replacement because no additional action is needed to secure the freedom to engage in homosexual relationships. Removing a rule from the law books is not always sufficient, however. In some instances, and in line with the rebuilding goals of the Constitution, new laws must be written to meet the commands and aspirations of the supreme law. And it is this task of law-making, at least when compared to the act of merely deleting rules, that proves far more difficult and complex. The crafting of new legal rights, procedures, and institutions invites a series of

⁴ *Makwanyane* (n 1).

⁵ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

⁶ Statistics South Africa, *Poverty Trends in South Africa: An Examination of Absolute Poverty Between 2006 and 2015*, Report No. 03-10-06 (2017) 14. A quarter of the population — nearly 14 million people — fall below the food poverty line of R441 (less than £30) per person per month.

⁷ No constitution can solve all social ills, but the full potential of the South African Constitution in developing platforms to assist in ameliorating some of the country's toughest social problems has yet to be realised. See Edwin Cameron and Max Taylor, 'The Untapped Potential of the Mandela Constitution' (2017) *Public Law* 382, 407.

⁸ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

tough choices. The Constitution may sketch the foundations, but it offers lawmakers no complete blueprint on how competing options should be evaluated and ultimately resolved.

That the Constitution defers its completion to future laws provides an indication of some of the challenges this law-making task poses. Constitutional drafters often adopt general and flexible language to manage both political conflict and uncertainty, which, in time, requires lawmakers to perform a task that the drafters could not accomplish; that is, to translate general principles and broadly phrased requirements into concrete duties and workable procedures.⁹ And the space in which to execute this law-rebuilding mandate can be narrow. Not only must these rebuilding laws comply with all the commands of the supreme law, they also have to respond appropriately to the many economic and other social pressures that already make governing difficult.

To illustrate the above point, consider the constitutional right to make reproductive decisions.¹⁰ In addition to prohibiting laws that impose a blanket ban on abortions, the right requires the active taking of measures to ensure the opportunity to abort a foetus is both actual and safe.¹¹ As the Constitution remains silent on how to achieve this outcome, lawmakers are required to identify and provide the conditions under which women may choose to terminate a pregnancy. This includes, amongst many other things, prescribing protocols to identify and monitor the medical practitioners and institutions authorised to perform abortions, funding pre- and post-abortion counselling services, and designing specialised procedures in situations where the pregnant woman is a minor or mentally disabled.¹² These choices are difficult, partly because the production of new laws is often made on the basis of assumptions, incomplete information, and conflicting moral viewpoints. Furthermore, the funding of public goods and services is enormously expensive and the provision of healthcare is amongst the costliest. In a country where a majority of people cannot afford private healthcare services, lawmakers must decide how best to raise and allocate limited public resources. The law reports tell of the harrowing decisions that state officials have had to make on account of public

⁹ Rosalind Dixon and Tom Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 *ICON* 636, 646–58.

¹⁰ Constitution s 12(2)(a).

¹¹ UNCESCR, *General Comment No. 22: The Right to Sexual and Reproductive Health (Art 12 of the Covenant)*, 2 May 2016, E/C.12/GC/22, paras 11–21.

¹² Choice on Termination of Pregnancy Act 92 of 1996, read alongside Choice on Termination of Pregnancy Amendment Act 1 of 2008.

resources being insufficient to secure those basic goods needed for human preservation and development.¹³ The inherent difficulty of the law-making process is further compounded by the fact that lawmakers can rarely predict with precision the end results of a new law. Society is complicated and forever changing, and so too are the problems that lawmakers are expected to solve.

The South African Constitution is thus an unfinished map, entrusting upon future lawmakers discretion to mark and navigate the path towards the society it envisions.

2 Who should rebuild the law?

There is an additional difference between the two types of remedial actions which further amplifies the complexity of the law-building task. The power to declare laws unconstitutional and unenforceable is assigned exclusively to a single branch of government. Section 172(1)(a) of the Constitution mandates the courts alone to declare invalid any law or conduct inconsistent with the Constitution.¹⁴ No other institution is afforded a similar power.¹⁵

The hierarchy between the branches of government turns murky whenever the law fails to give proper effect to the Constitution. Section 172(1)(b), which serves as the overarching power of the courts to order remedies in constitutional matters, merely enjoins the courts to ‘make any order that is just and equitable’.¹⁶ As the text of the Constitution offers no automatic solution or clear framework on which law-making institution should rebuild the law, the courts are left with a choice. A court can either amend the law of its own accord or order Parliament to promulgate legislation.¹⁷ The Constitutional Court of South Africa (court) views this judicial discretion as part of the

¹³ *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) paras 28–30.

¹⁴ Constitution s 172(2)(a) requires the Constitutional Court to confirm any ruling by a lower court that finds invalid national or provincial legislation or the conduct of the President.

¹⁵ *Executive Council of the Western Cape Legislature v President of the Republic* 1995 (4) SA 877 (CC) para 100. See Constitution ss 79–80 (the two elected branches of government are provided with non-binding procedures to deliberate whether or not a proposed law overreaches constitutional boundaries).

¹⁶ Constitution s 172(1)(b) permits the courts to make any just and equitable order following a declaration of invalidity, including limiting the retrospective effect of an order and suspending the declaration of invalidity to allow the relevant authority to correct the defect.

¹⁷ See generally *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) paras 82–84; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) paras 62.

intentional design of the Constitution. The court has thus refused to codify a fixed rule as to when courts are permitted to create law without the input of the legislature believing that the appropriate institution for remedying a defect must be determined by the facts and circumstances of each case.¹⁸

2.1 *Legislative law-making*

As a general principle of constitutional law — or, at least, as a starting point to this discussion — it should be of no major controversy to claim that the Constitution appoints the legislative branch of government to serve as the primary institution responsible for law reform.¹⁹ Parliament is conferred with the general authority to enact legislation, and, on no fewer than 50 occasions, the text of the Constitution instructs the legislature to promulgate laws in order to flesh out and give proper effect to constitutional provisions.²⁰ These instructions are scattered throughout the Constitution, and cover a wide range of matters. They include, amongst other things, the management of public servants,²¹ the civil control over security services,²² and the organisation of an independent prosecuting authority.²³ The Bill of Rights also mandates the promulgation of legislation. Seven constitutional rights require the legislature to enact laws so as to either define the scope of the right or provide mechanisms for the implementation of the right²⁴ (a further six constitutional right provisions permit but do not oblige the state to enact legislation).²⁵ The duty to enact legislation is not confined to those instances where the legislature is expressly burdened. The legislature assumes an important role in realising constitutional rights, and the courts have accordingly held that certain constitutional rights embody an

¹⁸ *C v Department of Health and Social Development* 2012 (2) SA 208 (CC) paras 43–44; *National Council for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 66.

¹⁹ Constitution ss 43–44. See *Paulsen v Slip Knot Investments* 2015 (3) SA 479 (CC) para 57.

²⁰ Constitution ss 3(3), 6, 9(4), 25(9), 26(2), 27(2), 32(2), 33(3), 46(1)(a), 47(4), 61(2)(a)(i), 62(5), 96(1), 105(2), 106(4), 136(1), 155(2), 155(3), 157(2), 158(3), 159(1), 171, 172(2)(c), 174(4), 179(3), 179(4), 179(7), 182(1), 182(5), 184(2), 185(2), 186(1), 187(2), 190(1)(a), 191, 192, 195(3), 196(2), 197(1), 197(2), 199(4), 199(8), 204, 205(2), 206(6), 207(6), 208, 210, 215(2), 216(1), 219(2), 219(5), 221(1)(b), 236.

²¹ *ibid* ss 196–97.

²² *ibid* s 199(8).

²³ *ibid* s 179.

²⁴ Constitution ss 9(4) (equality); 24(2) (environment); 25(5), (7), & (9) (property); s 26(2) (housing); 27(2) (health care, food, water, social security); 32(2) (information); 33(1) (administrative action).

²⁵ Constitution ss 15(3) (religion, belief, and opinion), 22 (trade, occupation and profession), 23(5) (collective bargaining), 23(6) (union security), 25(1) (expropriation of property), 25(8) (land, water and related reform).

implicit duty upon the state to take active measures to ‘protect’ and ‘fulfil’ a right, which may necessitate the promulgation of legislation.²⁶

Four core reasons justify the primacy of the legislative law-making process.

First, the legislature is the modern-day civic square. The legislative process encourages the representation and participation of citizens in public decision-making. This is not to say that a legislative majority may simply ignore the commands of the Constitution. That sort of reasoning would defeat the entire purpose of entrenching constitutional provisions. The benefit of public participation is rather found in the observation that the legislative law-making process promotes a more informed and reflective process capable of creating political solutions to reconcile competing constitutional and public interests.²⁷ Rarely are there clear solutions, but consultative and participatory decision-making is championed as a way to improve the quality and accuracy of decisions. In fact, the very purpose of some constitutional provisions is to provide for the creation of frameworks to assist in managing and curing some of South Africa’s most complex social problems. For example, socio-economic rights mandate the state to take reasonable legislative measures to achieve the progressive realisation of essential human goods like housing and healthcare for those who are unable to secure these goods on their own means.²⁸ Constitutions must therefore remain alive to public thinking and changes in the social environment if they are to serve as an effective roadmap for governance, and the legislature is arguably the best positioned state institution to absorb and respond to change and conflict. It is for this reason that the courts have at times shown a reluctance to produce new laws, turning rather to the legislature for advice. In the legal recognition of same-sex marriage, for instance, after the Constitutional Court declared bans on same-sex marriage unconstitutional, the majority of the court declined to rewrite the legal definition of a marriage. The court emphasised that the recognition of same-sex marriage was not purely a matter of striking down a discriminatory law.²⁹ Law reform on matters of family relationships requires an

²⁶ Constitution s 7(2). For examples of the Constitutional Court interpreting constitutional provisions to impose an obligation on the state to promulgate legislation in the context of preventing violence, see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); para 44; *S v Baloyi* 2000 (2) SA 425 (CC) para 11.

²⁷ *Poverty Alleviation Network v President of the Republic* 2010 (6) BCLR 520 (CC) para 33; *Matatiele Municipality v President of the Republic (No. 2)* 2007 (6) SA 477 (CC) para 66.

²⁸ Constitution ss 26(2), 27(2).

²⁹ *Fourie* (n 5) paras 121, 125–53.

array of choices, including how best to manage disagreement in society. The majority of the court concluded that the legislature is better placed to provide a final solution. The legislature responded by recognising both same-sex marriage and civil partnerships for homosexual couples, but offered marriage officers the opportunity to exempt themselves from solemnising same-sex unions.³⁰

Second, the legislative process benefits from the expertise of the elected branches of government. Legislation is built upon policy research and government experience. Although this combination does not guarantee perfect results, it does inject a great amount of knowledge into the process of creating legal frameworks. The benefit of expertise is not confined to the moment of creating frameworks. The legislature often creates a mixture of internal and external oversight mechanisms to monitor and review the implementation of public programmes. Oversight and feedback adds to the institutional knowledge of the state, allowing Parliament with the assistance of the executive government to improve legal frameworks whenever new insights are learnt.

Third, legislation permits a degree of arbitrary line drawing. The purpose of legislation is to implement policy, and, to do so, legislation draws boundaries amongst segments in society, conferring benefits on some and disadvantages on others.³¹ Consider abortion legislation. The legislative scheme divides the gestation period into three parts.³² From conception until the thirteenth week of pregnancy, women may undergo an abortion for whatever reason they believe acceptable. Between thirteen and twenty weeks, women may only terminate a pregnancy in one of four circumstances. These are (i) if the mother's own physical or mental health is at stake, (ii) the baby will have severe mental or physical abnormalities, (iii) the pregnancy is a result of incest or rape, or (iv) the woman is of the opinion that her socio-economic conditions require termination. Furthermore, after the first gestation period, enhanced medical procedures are also required. After twenty weeks, abortions are only permitted if the life of either the mother or the foetus is in danger or the foetus is likely to be born with serious defects. The decision to make weeks thirteen and twenty the cut-off periods is taken on the basis of scientific evidence and policy considerations, but they are also made on somewhat arbitrary grounds (consider the fact that legislators in other countries not only divide the

³⁰ Civil Unions Act 17 of 2006, s 6.

³¹ *Sarrahwitz v Maritz* 2015 (4) SA 491 (CC) para 85.

³² Choice on Termination of Pregnancy Act (n 12) s 2.

gestation period differently but also list different conditions for each period). The division of the gestation period is certainly not an exact science given that each foetus develops at a different rate. But this line drawing is necessary as more individualised and decentralised processes would prove far too timely and costly. To govern a country of more than 55 million people, somewhat arbitrary requirements and fixed boundaries are needed.

Fourth, the legislature commands the public purse.³³ Public programmes requires funds, and, given that the legislature is exclusively vested with the power to raise and allocate public funds, the participation of Parliament is needed whenever a new public programme is created and implemented.

All of these benefits innate to the legislative law-making process allow the legislature to create legal frameworks that flesh out and give proper effect to the commands of the Constitution, provided of course that the legislature has the political will to do so. It is a law-making process that no other state institution — say, for example, the judiciary — can match. In truth, some of these law-making responsibilities are so administratively technical and so intertwined with the functioning of government that it seems unfathomable that judges would ever produce laws on their own. The courts will not, for instance, legislate the operations of the prosecuting authority or administer the running of the civil service. To the extent that subordinate laws fails to do so, courts would merely order the legislature to remedy their inaction.³⁴ This leads to an additional argument in favour of legislation. The judiciary is never excluded from the process of rebuilding the law, as courts retain their powers to review whether or not the enacted law passes constitutional muster. The legislative law-making pathway thus prioritises the respective expertise of the two institutions. Parliament produces laws, and the courts ensure legal compliance.

2.2 *Judicial law-making*

Despite these benefits, the legislative law-making process may prove troublesome. Legislation is the product of political decision-making.³⁵ Even if parliamentarians

³³ Constitution ss 77, 213–14.

³⁴ See *Glenister v President of the Republic* 2011 (3) SA 347 (CC).

³⁵ David Feldman, ‘Can and Should Parliament Protect Human Rights?’ (2004) 10 *European Public Law* 635, 647.

profess that they are acting in accordance with the legal prescripts and aims of the Constitution — and South Africans politicians often say they are — the inherent nature of the legislative law-making process is that laws will be produced with an aim of furthering the policy aims of each political party. To be clear, that Parliament makes choices based on political motives should not be read as a criticism of the legislative law-making process. Members of the legislature are elected to offer competing versions of policy, and, once a majority consensus is reached, policy is translated into law. This process is essential for the functioning of an orderly society, and it is the reason that law-making powers are conferred upon the legislature. At the same time, however, one cannot always expect the political machinery of a democratically representative decision-making body to advance constitutional provisions.

Political decision-making is a particular concern for the protection of constitutional right provisions, which are entrenched primarily as a means to safeguard certain individual interests against ordinary majority decision-making. There is a strong argument to be made that the views of the legislature should not matter when it comes to the enforcement of constitutional right provisions.³⁶ A litigant is entitled to a remedy unless a compelling government interest is at jeopardy, and the protection of their constitutional right should not depend on whether or not a democratically elected legislature has the political will to promulgate appropriate legislation.³⁷ Moreover, the judicial development of the law — which is usually, but not exclusively, done through the common law — does not prevent the legislature from intervening in the future provided of course that any revisions to judge-made law comply with the Constitution.³⁸

The political nature of legislative decision-making explains why Parliament invokes constitutional rights to intervene in certain areas and not others. Consider marriage law. Section 15 of the Constitution safeguards the right to freedom of religion and belief. The constitutional provision permits, but does not mandate, the state to enact legislation that recognises marriages concluded under any traditional practice or religious law. Prior to the Constitution, the common law adopted elements of the Christian definition of marriage: a union between one man and one woman to the exclusion of all others. The post-apartheid legislature has since passed the Recognition of Customary

³⁶ See *Fourie* (n 5) paras 166–72.

³⁷ *S v Bhulwana* 1996 (1) SA 388 (CC) para 32.

³⁸ *Paulsen* (n 19) para 116.

Marriages Act, which provides recognition and protection to African customary marriages (which may be polygamous). The passing of the Act made political sense. A large majority of the South African population belong to groups that practice customary marriages. Yet Parliament has opted not to extend the same protection to other sorts of religious or cultural marriages that may permit polygamy, such as marriages concluded under the Islamic faith. The Muslim community is a small minority in South Africa, forming no more than two per cent of the population.³⁹ As is the case in nearly all instances of state inaction, the failure of the legislature to conform law to constitutional standards is on account of either their approval or indifference with the status quo. The silence of Parliament has forced the courts to provide piecemeal support. While the law still does not recognise Muslim marriages, the courts have extended the right to maintenance and inheritance to spouses in Muslim marriages, including to those spouses in polygamous relationships, reasoning that these personal family relationships constitute a unique contractual duty of support similar to marriage contracts.⁴⁰

3 Rebuilding private law

The law-making function is arguably the main reason why the process of rebuilding private law in accordance with constitutional rights has proven difficult to navigate. The application of constitutional provisions to private law — called the horizontal application of constitutional rights — rarely requires just the deletion of rules. It more often results in a process of rebuilding existing laws. Consider an example from contract law: the adjudicative process of identifying the extent to which the freedom to contract should be restricted in order to safeguard the right not to be unfairly discriminated against will invariably result in the creation of new rules, ones that carve out exceptions to the general principle of contractual autonomy.⁴¹

³⁹ The government initiated legislation to recognise Muslim marriage, but those efforts stalled when the proposed legislative scheme failed to gain support from religious communities. See South African Law Reform Commission, *Project 59: Report on Islamic Marriage and Related Matters*, July 2003. The Women's Legal Centre Trust has recently initiated litigation seeking an order to compel the state to recognise Muslim marriages (they argue that Muslim women are subject to discriminatory practices, including financial inequality).

⁴⁰ *Daniels v Campbell* 2004 (5) SA 331 (CC); *Ryland v Edros* 1997 (2) SA 690 (C). In *Hassam v Jacobs* 2009 (5) SA 572 (CC), the Constitutional Court ruled that women in polygamous marriages concluded under Muslim personal law are entitled to inherit from the estate of their deceased husband if there is no will.

⁴¹ *Botha v Rich* 2014 (4) SA 124 (CC) para 45; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 70.

The law journals record a dizzying amount of debate over the judicial application of constitutional right norms, with every other essay plotting a fresh cluster of bearings that the courts should track. In fact, it is difficult to find scholarship that believes the courts have proceeded along the correct route and at the correct pace. The court is criticised in equal measure for travelling both too slowly and too quickly. The first group of critics argues that the court has not been robust enough in adapting the rules of private law to constitutional norms, even though the waters ahead are choppy and uncharted.⁴² Though there is no clear way forward, this group contends that the need to ensure that private law meets constitutional norms overrides concerns over the disruption and unpredictable result that the rebuilding process may cause. The second group of critics argues that the court has evaporated legal doctrine and introduced too much uncertainty into private law.⁴³ They advise the courts to slow down, or perhaps even remain anchored, warning that embarking on a journey without first fully establishing new sets of doctrines will prove destructive to centuries-old law.

Despite offering a multiplicity of conclusions, most of the literature on the horizontal application of rights tends to share a similar feature. The emphasis falls upon the law-making powers of the courts, and the role of the legislature is either confined to the periphery of the analysis or completely ignored. The reasons why scholars prioritise the judicial law-making function are not clear, but one can speculate on some of them. For starters, there is a general trend in legal scholarship to focus on analysing case law over legislation (presumably because the process through which legislation is created is political, and thus falls outside the expertise of lawyers). Another possible reason is that the horizontal application of rights invites the courts to assume a more active role in making law. Courts, and particularly those in common law systems, have of course always enjoyed the authority to create law in situations of legislative reticence. The very nature of judicial discretion is a law-making task, but, in certain quarters, it is blasphemous to state so out loud (the more palatable approach is that judges find the law from general legal principles and convictions).⁴⁴ In one sense, the horizontal application of rights removes this pretence. The Constitution actively spurs the courts to undertake a

⁴² See Dennis Davis, 'Private Law After 1994: Progressive Development or Schizoid Confusion?' (2008) 24 *SAJHR* 318.

⁴³ See Malcolm Wallis, 'The Common Law's Cool Ideas for Dealing with Ms Hubbard' (2015) 132 *SALJ* 940.

⁴⁴ See *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SECLD) at 597J–598A.

law-making task in order to give effect to constitutional right norms in private law. In fact, the horizontal application provisions are the only instance where the Constitution vests in the courts an express power to make law (which stands in contrast to the more than 50 occasions the Constitution instructs the legislature to promulgate new laws).⁴⁵ The intellectual challenge of horizontal application is therefore to identify both the source and the limits of the judicial power to rewrite the rules of private law with public law norms. Another potential explanation is that horizontal application flows as a consequence of state inaction. The judicial process of reviewing and rewriting the rules of private law is only instigated if there is no suitable private law available to vindicate the interest protected by a constitutional right. Perhaps then there is an implicit assumption underlying all horizontal application scholarship that the power of the courts to remedy state inaction is automatic, and it is of no consequence that the legislature has opted not to act.

The underlying foundation of this dissertation is that scholarship is the poorer for failing to consider the role of the legislature in protecting constitutional rights in the private sphere. Rights legislation — which is the term that will be used to describe legislative schemes that aim to give effect to constitutional rights in the private sphere — forms a central and integral component of our doctrine on the application of constitutional rights to private individuals and entities. Not only is legislation the primary route through which private litigants must realise their constitutional rights, but, given the hierarchy between the two sources of law, rights legislation informs the way in which the judiciary exercises their law-making powers under the horizontal application provisions.

To amplify the importance of legislation, one need only consider the fact that there are only two constitutional rights that expressly impose obligations upon private individuals and entities, and, in both instances, Parliament is mandated to pass laws in order to give legal effect to the private duty. The first is the equality clause. Section 9 prohibits all non-state actors from discriminating on any of the listed grounds.⁴⁶ The obligation is however not self-executing. That is, private litigants cannot plead the constitutional right as a cause of action. The provision continues to instruct the legislature to enact a statutory framework that gives effect to the obligation. In other words, the constitutional right not to be discriminated against in the private sphere is not

⁴⁵ Constitution ss 8(3), 39(2).

⁴⁶ Constitution s 9.

so much a right against a private individual or entity. It is primarily a right, enforceable against the state, to anti-discrimination legislation. The second instance is the right to access information. Section 32(1)(b) provides that each person has the right to gain access to any information held by another person if that information is needed to exercise or protect another right. The enforcement mechanism of the access to information right mimics the equality clause. It too does not give rise to an immediately enforceable right-duty relationship between private individuals and entities, but rather demands the promulgation of national legislation.⁴⁷

If nothing else, the thesis argues that when the legislative law-making pathway is considered alongside the judicial pathway, the Constitutional Court's jurisprudence on the horizontal application of rights is neither as slow nor as uncertain as the critics suggest. But a question still remains on how these two law-making pathways relate to one another. Figuring this out is the primary goal of the thesis.

4 The research project

The research project investigates the law-making tension that arises whenever private law fails to meet constitutional norms.⁴⁸ Two law-making options are available. The first is for the judiciary to develop or change private law principles and rules in order to provide protection for the implicated constitutional norm. The second is for the judiciary to enforce an obligation upon the legislature to enact legislation to amend or replace existing private law rights and obligations so as to safeguard the norm against interference from a private individual or entity. While the former is the more conventional option, in recent years, the law reports record an increasing reliance on the legislative duty to protect constitutional right norms in private legal relationships. The research project investigates the extent to which the latter phenomenon — which will be described as a 'pivot towards legislative remedies' — exists, and the circumstances in which the courts pivot towards legislative remedies rather than developing the private law of their own accord.

To answer these question, the research project must identify the differences between the ways in which the two law making institutions give effect to the horizontality

⁴⁷ Constitution s 32(2).

⁴⁸ 'Constitutional right norms' encompass constitutional rights and constitutional values.

provisions in the South African Constitution, and, thereafter, identify how the judiciary has responded to these differences. To do so, the research project splits into three parts.

- *The (Missing) Architecture.* The starting point is to identify the aims of horizontality within the South African constitutional order, and to explain why the translation of those aims into constitutional provisions give rise to two sorts of law-making problems. The first problem is a tension between two law-making institutions, and, as explained above, requires the courts to decide whether to remedy the law or seek legislative assistance. The second problem arises whenever the courts opt to develop the law, and stems from the observation that the Constitution fails to provide the courts with a comprehensive framework on how to exercise their law-making powers under the horizontality provisions. These two law-making problems are explained in chapters two and three respectively.
- *Judicial Law-Making.* The middle part of the thesis identifies how the Constitutional Court has solved the second law-making problem. Chapter four demonstrates the court's preference for a certain type of law-making framework, which is called the 'balancing process'. Chapter five elaborates on how the balancing process operates, including how constitutional right norms must assume certain characteristics to make the balancing process functional.
- *The Judicial Response to Legislative Law-Making.* The last part of the thesis circles back to the first law-making problem. Chapter six employs a case study to show how the court pivots horizontal application disputes away from judicial remedies to legislative ones, and chapter seven employs a case study to show the opposite result. Through comparing these two case studies, chapter eight identifies the enhanced benefits of the legislative law-making pathway (as compared with the limits of the judicial process). This analysis provides an indication as to the conditions under which courts are likely to pivot towards legislative remedies.

5 Summary

The judicial law-making process turns on the balancing of conflicting right norms. To do so, the Constitutional Court has developed the ‘balancing process’. The defining feature of this framework is that it allows for the contextual balancing of right norms within private law, which, in its simplest form, distils to a process that weighs the need to safeguard the interest protected by a constitutional right norm against the need to control the exercise of private power. In comparison, the legislative law-making process enjoys an array of benefits that are absent from or reduced in the judicial law-making process. Three core differences are identified. Legislation is an enhancement on the judicial law-making process because the legislative framework for the balancing of conflict rights:

- is better structured, which promotes legal certainty and narrows the scope of disagreement between disputing parties;
- contains government policy, which assists in directing the outcome in socially and economically complicated disputes; and
- clarifies the constitutional obligations of the state, which, in turn, clarifies the obligations of private individuals and entities.

It bears noting from the outset that theories of judicial deference do not explain the pivot. The courts have ceded neither their power nor their mandate. On the contrary, the courts have exercised control over constitutional rights legislation. Through either statutory interpretation or the judicial review of legislation, the South African Constitutional Court has demanded that the essentials of the product developed during the judicial-law making process is observed within legislation. From this perspective, the judicial law-making process is the floor of law-reform and the legislative process is an enhancement on that process. The judicial pivot towards legislative remedies is thus best explained as a creative strategy to enhance the judicial balancing process, as it allows for the constitutional rebuilding of private law in a way that the judiciary is unable to do on its own.

In the end, the strategy to enhance the judicial balancing process offers a more precise as well as a more constitutionally sound explanation — as opposed to generic arguments like the ‘separation of powers’ and ‘Parliament is the chief law-reform institution’ — for why courts decline to exercise their law-making powers under the horizontality provisions in favour of legislative remedies.

6 Methodology

Before proceeding, it may prove wise to set out four brief notes on the methodology and treatment of the source material.

First, the thesis applies mostly a doctrinal methodology, and the bulk of the legal texts consulted include the Constitution, national legislation, and the case law of the Constitutional Court and Supreme Court of Appeal. That being said, however, the analysis cannot be defined as purely ‘black letter’. Legal scholarship is a social science, which renders the reading of law contingent on the broader context in which it applies. More specifically, the subject nature of the research project demands this more holistic treatment of the source material. Law-making is not a self-contained and purely logical process of deducing rules from general legal principles, and the success of the rebuilding project requires the Constitution to absorb and respond to the economic and political landscape of the country.⁴⁹ To this end, the thesis applies a historical methodology in chapter two in order to place the legal texts within their social context. The broader social environment also informs the analysis of legal texts, which, for example, include assessing the political and economic conditions under which the legislature is willing to act. The inclusion of these factors into the analysis is necessary, but it does introduce a risk of bias and caution must therefore be exercised. To mitigate this risk, data and empirical accounts are used to describe and assess the broader social context. The thesis takes care to demarcate its own assessment of the broader environment from that contained in case law and legislative policy. Additionally, in a few instances, the thesis analyses case law from foreign jurisdiction in order to help expose the assumptions upon which certain judicial decisions rests.⁵⁰

Second, the thesis assumes that coherence is a core objective of the law. As is to be expected with any new and highly contested area of the law, which the application of constitutional rights to private individuals and entities certainly is, the courts have at times produced contradictory results and left logic-gaps in their arguments. To the extent possible and necessary, the thesis seeks to reconcile conflicting positions and complete the steps of reasoning.

⁴⁹ See *Hyundai Motor Distributors* (n 2).

⁵⁰ See Kate O’Regan, ‘Text Matters’ (2012) 75 *MLR* 1, 24–25.

Third, Part C of the thesis focuses on two case studies to illustrate how the judiciary responds to the legislative law-making process; namely, the section 26 right to access adequate housing and the section 19(1)(b) right to participate in the activities of a political party. These two case studies are selected because they best illustrate two extremes. The case law on the housing right shows a Constitutional Court avoiding the common law and rather pivoting towards legislation, whereas the case law on the right to political participation shows a court embracing the development of the common law and ignoring legislative preference. The two contrasting approaches allows for an examination of the conditions under which the Constitutional Courts is likely to refrain from exercising its law-making mandate under the horizontal application provisions and rather seek out legislative remedies.

Fourth, the thesis analysis the law as stated on 31 December 2017.

PART A

THE (MISSING) ARCHITECTURE

REMEDYING WICKED LAWS

This chapter traces the drafting history of the Constitution to identify the initial aims of horizontality, which, in turn, explains why the horizontality provisions give rise to a law-making tension between the judiciary and the legislature. To place the drafting history in context, the beginning sections of the chapter sketch a brief (and selected) history of apartheid.

1 A racist economy

The apartheid legal system was not limited to acts of electoral disenfranchisement. The political subordination of racial groups was built upon, and maintained in furtherance of, a market economy geared to favour the white minority. The defining feature of this rigged economic model was to control access to land, which was a strategy implemented through the enactment of discriminatory laws that imposed extensive restrictions on the ownership and occupation of immovable property. The Group Areas Act, for instance, split urban areas into several residential and commercial sections.¹ Race groups were allocated different sections of the city, and, under threat of criminal conviction, individuals were prohibited from owning, residing, and conducting business practices in areas designated for a different race group. The basis upon which land was allocated is predictable. The black population was assigned the underdeveloped townships located on the city outskirts. In stark contrast to the valuable areas of urban land reserved for the white population, the townships suffered from a shortage of public infrastructure,

¹ 41 of 1950. The Act was replaced by the Groups Areas Act 77 of 1957, which was later replaced by the Groups Areas Act 36 of 1966. The last manifestation of the Group Areas Act was repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.

government services, and basic economic resources required for human development. Inferior schooling systems and inadequate health facilities further hampered the economic and personal development of township residents.

Rural land was also divided and redistributed. The Native Lands Act, and its supporting legislation, empowered the state to create a framework aimed at reserving approximately 93 per cent (later downgraded to 87 per cent) of arable land for white ownership.² The rural black population was assigned to live on one of the ten ‘reserves’, defined on the basis of ethnicity.³ In later years, and in a further act of splitting up the South African population along racial and ethnic lines, the ‘reserves’ were reconceptualised as the so-called ‘independent’ or ‘self-governing’ Bantustan homelands. The homelands were however only independent in name. The reality was that traditional leaders and other political elites governed these communal lands with the financial assistance, and therefore under the control, of the apartheid government. Like their compatriots in the cities, the rural black population was starved of economic opportunities. Government services were abysmal, partly due to the fact that corruption was a common feature in the homelands.⁴ The limited funds sent from apartheid Pretoria were sparingly used for basic goods like housing, healthcare, and education. Employment opportunities were equally dire. A large majority of the Bantustan populations were forced to find employment in white-South Africa to support themselves and their families, and migrant workers shared a similar experience.⁵ They worked far away from their families, in poor conditions, and for minimal wages. Their economic deprivation was further exacerbated by the fact that residents were only afforded tenuous communal land rights to reside on plots of land, as opposed to stronger individual property rights.⁶ Outside the homelands, the tenure rights of the rural black were equally

² 29 of 1913. See also Native Trust Land Act 18 of 1936, which decreased the share of white-owned land to around 87 per cent. These Acts were repealed by the Abolition of Racially Based Land Measures Act (n 1).

³ Transkei (amaXhosa), Bophuthatswana (Batswana), Venda (VhaVenda), Ciskei (amaXhosa), Gazankulu (the Tsonga people), Lebowa (Bapedi), QwaQwa (Basotho), KaNgwane (amaSwati), KwaNdebele (amaNdebele), KwaZulu (amaZulu).

⁴ For a summary of the (limited) sources of income and the stifled economic development within the independent homelands, see Jeffrey Butler and others, *The Black Homelands of South Africa* (University of California Press 1977) chaps 6–8.

⁵ For an overview of how discriminatory land, tax, and labour laws coerced black individuals into the employment of white-owned businesses (particularly agricultural and mining companies), see Charles Feinstein, *An Economic History of South Africa* (CUP 2005) chap 3.

fragile. Their right to occupy land was subject to ‘permission to occupy’ licences.⁷ The apartheid government had to grant permission before a licence holder could transfer, let, or mortgage the land. Furthermore, the government retained the right to terminate these tenure rights in a number of instances, including the failure to pay administrative charges or upon the conviction of certain offences like theft or drug possession.⁸

The enforcement of racial segregation laws inflicted a quadruple economic burden on non-white communities. First, the law authorised the eviction of individuals residing in areas that were designated for different racial groups.⁹ Hundreds of thousands of people, if not more, were forcibly removed from their urban households, and more than three million South Africans were removed from about one fifth of all agricultural land. These evictions resulted in some of the harshest actions of the apartheid government. Not only were shelters and other personal property destroyed, people lost their most economically valuable asset: their home. The cruelty of this system was amplified by the fact that the legislature prevented judicial assistance. The Natives (Prohibition of Interdict) Act outright prohibited the courts from issuing any interdict or other legal process that had the effect of staying or suspending any government order directing a person be vacated or removed from an area.¹⁰ Second, as described above, the urban townships and rural black reserves suffered from a lack of basic resources essential for personal and economic development. Third, the provision of weaker communal land tenure rights over stronger ownership rights decreased the ability of black individuals to participate as equals in the economic market. In an unrigged economic market, many individuals opt to raise funds and pursue economic opportunities through mortgaging their fixed property. While available to white South Africans, black individuals were deprived of this economic opportunity. Fourth, racial segregation allowed the apartheid

⁶ Black South Africans, including those residing in urban areas, were stripped of their South African citizenship and forced to register as a national of the Bantustan homeland that corresponded to their respective ethnic group. See Bantu Homelands Citizenship Act 26 of 1970, repealed by the (interim) Constitution of the Republic of South Africa Act 200 of 1993.

⁷ Black Areas Land Regulations Act, Proc R188 of 1969. Licences operated in areas of rural land classified as South African Development Trust Land.

⁸ Catherine Coles, ‘Land Reform from Post-Apartheid South Africa’ (1993) 20 *Boston College Environmental Affairs Law Review* 699, 720.

⁹ Eviction orders, including orders permitting the destruction of property, were issued under the provisions of the Prevention of Illegal Squatting Act 52 of 1951 (repealed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998); the Reservation of Separate Amenities Act 49 of 1953 (repealed by the Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990); and the Trespass Act 6 of 1959.

¹⁰ 64 of 1956, s 2.

government to control access to the labour market. Through a system of influx control, enforced with passbooks, the government imposed extensive restrictions on the number of non-white individuals who could access high-earning jobs. This strategy ensured that uneducated black labour remained cheap, further impairing the ability of black families to secure a comfortable livelihood through their own means.

The effects of past discriminatory laws remain a painful and crippling wound in the economic and political landscape of South Africa and will continue to be the case for generations to follow. Previous economic deprivation is reflected in every metric. Today, white South Africans are far more likely to enjoy access to quality education, healthcare, and high paying employment opportunities. A recent national survey, for instance, shows that white-headed households earn five times more than black-headed households.¹¹ Figure 1 displays the historical difference between race groups.

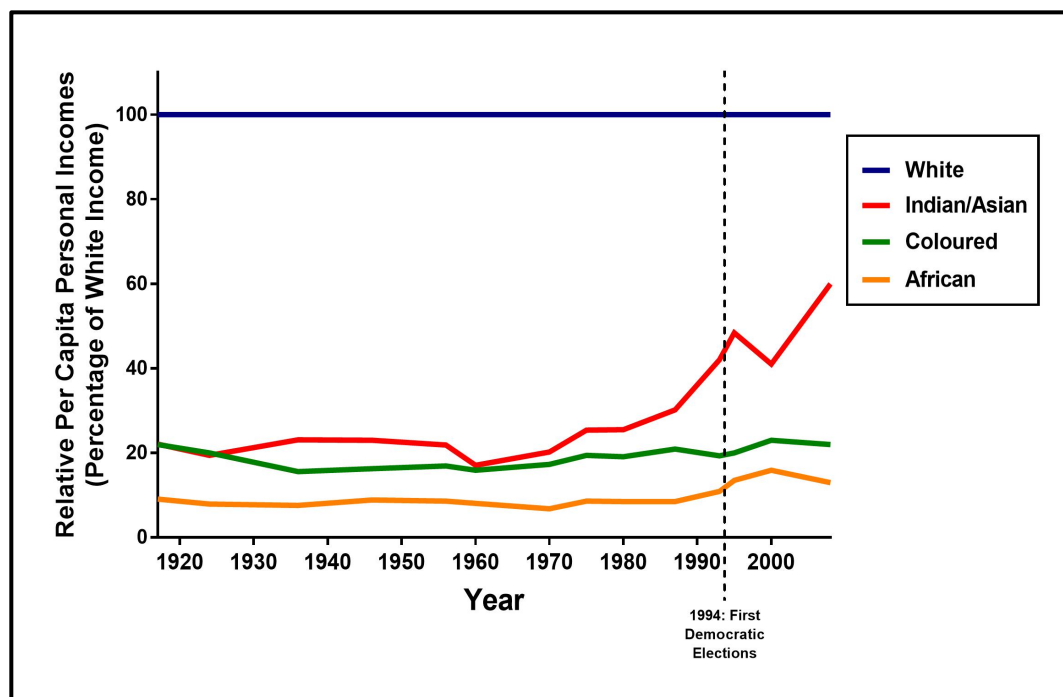


Figure 1: Change in per capita income for each race group relative to white income¹²

Legislation was not the only legal tool employed to engineer economic disparity along racial lines. On the most charitable interpretation, the common law played a supporting role to apartheid legislation. The common law was subject to parliamentary

¹¹ Statistics South Africa, *Living Conditions of Households in South Africa*, 27 January 2017, at 14–15.

¹² Murray Leibbrandt and others, ‘Trends in South African Income Distribution and Poverty Since the Fall of Apartheid’, 2010, *OECD Social Employment and Migration Working Papers No. 101*, OECD Publishing, 13.

sovereignty, and it was therefore forced to assume a subordinate role to racially rigged economic laws. Even judges sympathetic to the effects of discrimination were required to ensure that the common law remained blind to the structural inequality the law produced. In doing so, however, the common law enabled racially discriminatory statutes to achieve their goals. All of this shows how hypocritical the law had to be to support the aims of apartheid. On the one hand, legislation treated non-white individuals as inferior and accordingly restricted their capacity to pursue productive endeavours. On the other hand, however, the common law applied the exact same standards and rules across the race groups believing that all adults enjoyed the intelligence and freedom to engage with one another as equal partners regardless of race.¹³ The courts would therefore enforce commercial contracts between black and white individuals (unless legislation prohibited such contracts).

The common law never developed in a way that took cognisance of the deeper structural inequality in society, amending its rules and application to compensate for the fact that poverty and racism precluded a large majority of the population from engaging in the markets as equals. This was all intentional, of course. The ostensibly ‘neutral’ rules of the common law allowed for economic exploitation because wealthy white individuals could exploit cheaper labour on account of their relatively better economic position, which further exasperated the inequality between race groups. Furthermore, the classical liberalism philosophy of the South African common law enabled prejudice to flourish. Though there were some attempts to restrict the capacity of individuals to act on their prejudice in particular situations,¹⁴ the general principle was that private individuals and entities were free to choose their association partners and were entitled to do so on irrational reasons such as racial bias.¹⁵

Apartheid therefore tells not only a story of abusive state action. It was an ideology that crept into every corner of society and every part of the law, including the private common law. The law engineered an economically unequal society. Those at the

¹³ See *Mapenduka v Ashington* 1918 EDL 299, at 309, read alongside Martin Chanock, *The Making of South African Legal Culture 1902–1936* (CUP 2001) 14.

¹⁴ For example, see *Jockie v Meyer* 1945 AD 354, at 357, 360–61 (A hotel refused to provide accommodation to a lodger on the basis of their race; the AD suggested, without deciding, that a hotel could only deny accommodation to a traveller if there is a ‘good ground’ to do so, suggesting that race was not a sufficiently good reason).

¹⁵ *Mustapha v Receiver of Revenue* 1958 (3) SA 343 (A) at 347F (‘For no reason or the worst of reasons the private owner can exclude whom he wills from his property and eject anyone to whom he has given merely precarious permission to be there’).

top could act on their biases free from any legal or economic consequences, with the law providing white individuals an opportunity to exploit their relative economic advantage.¹⁶

The inability of the South African common law to provide adequate protection to the liberty interests of non-white individuals is ironic given one of the main reasons individual common law rights originally developed. The South African common law's notion of private property stems from European roots, where it evolved in response to the socio-political concerns of that time. Land had historically been administered under communal or feudal powers, which granted individuals certain entitlements to reside on the land. But these entitlements were contingent on the performance of duties, including the provision of labour and the payment of taxes. The call to recognise and protect a stronger form of individual property rights amplified in the eighteenth century, which is the time when the historically dubbed Age of Enlightenment introduced into public thinking a greater emphasis on individual liberty and the constitutional management of government. Individual property rights came to be celebrated as the guardians of personal and economic freedom, as they ensured a degree of autonomy for each right holder which was enforceable against state and neighbour alike.¹⁷ In South African, and for a large portion of the population, the judicial enforcement of property rights resulted in the opposite effect. The common law, operating alongside discriminatory legislation, hindered economic and personal security. With little-to-no property of their own, non-white populations struggled to participate as true equals. In a recent case before the Constitutional Court, a judge astutely remarked that South Africa's colonial and apartheid history meant that there never was a 'free market' as these ostensibly neutral private property rights found in the common law were applied within a broader legal framework that only permitted a few to benefit.¹⁸

[W]e must recognise that the common law protection of property and its attendant economic privilege did not, in our historical context, support personal autonomy and economic freedom, but effectively worked against it. The argument that the protection of existing property is a necessary condition for personal and economic freedom is not self-explanatory in the South African context.¹⁹

¹⁶ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 125; *Gardener v Whitaker* 1995 (2) SA 672 (E) at 685C–E.

¹⁷ AJ van der Walt, *Property in the Margins* (Hart 2009) 29–31.

¹⁸ *Daniels v Scribante* 2017 (4) SA 341 (CC) para 152 (Froneman J).

¹⁹ *ibid* para 143.

2 The patriarchal home

The architects of apartheid justified their actions on an eccentric interpretation of Christian doctrine. Their dogma not only propagated the supremacy of the white race, but also positioned men at the apex of both the economy and family. Women earned less in the employment market, and were expected to assume a subordinate role in family life.²⁰

The common law encouraged patriarchal family relationships. The default position was that married women were subject to the marital power of their husbands, which meant that women were legally required to obtain consent from their husbands before concluding a contract. The common law literally treated married women as minors with diminished legal capacity.²¹ It was only towards the end of apartheid when Parliament changed the legal consequences of a civil marriage. Civil marriages concluded from 1 November 1984 made both spouses the joint administrators of the communal estate. Marriages concluded under customary-indigenous law would only be altered after the fall of apartheid.

Another common law rule of shameful proportions was that a husband could legally not rape his wife.²² Consent was irrelevant as the common law offered husbands an unqualified conjugal right to sexual relations. Given that the law viewed marriage as a private affair in which the law should not intervene, there are no official records on the full extent of marital ‘rape’ and other forms of domestic violence. Estimates make for harrowing reading. Between one quarter and one third of all women experienced some form of assault at the hands of their husband or intimate partner.²³ In the final years of apartheid, the Law Commission proposed criminalising marital ‘rape’. Parliament rejected the proposal. The sentiments expressed by a member of the legislature in rejecting the proposal encapsulate the assumptions and justification on which Parliament

²⁰ *Volks v Robinson* 2005 (5) BCLR 446 (CC) paras 108–09.

²¹ For an overview of how marriage law treated women as inferior prior to the formal commencement of apartheid, see Chanock (n 13) 200–201.

²² For a summary of failed attempts to criminalise marital rape, see Felicity Kaganas and Christina Murray, ‘Law Reform and the Family’ (1991) 18 *Journal of Law and Society* 287, 287–90.

²³ See Human Rights Watch, *The State Response to Domestic Violence and Rape*, November 1995, and the studies cited under the heading ‘Domestic Violence’.

so often elected not to intervene in family relationships, and, in doing so, supported the common law position.

It is simply unacceptable for one partner to be subject to [criminal] penalty — even in cases in which no violence has taken place — if the other party unreasonably refuses sexual accessibility and that party is left unpunished. This is the kind of inexplicable situation that arises when criminal procedure becomes involved with the most intimate things in the law of family.²⁴

Even after the legislature criminalised marital ‘rape’ in 1993,²⁵ the courts continued to apply gender-discriminatory rules found within the common law. The cautionary rule, for instance, required judges to treat the testimony of rape victims with a heightened degree of caution, particularly if there was no other supporting evidence.²⁶ Further, husbands and intimate partners convicted of raping their partner would tend to receive lighter sentences. In mitigation of the sentence, (male) judges would sometimes cite that the perpetrator only committed the act on account of the close nature of their relationship with the victim or that the complainant suffered no visible harm.²⁷ In a particularly striking case, a three judge panel of the Appellate Division remitted a rape conviction for resentencing and requested the trial court to consider whether a sentence of correctional supervision was more appropriate. In mitigating for a lesser sentence, the AD cited that (i) the rape was not based on violence, but merely sexual gratification, (ii) the victim knew the rapists, and (iii) there was no evidence that the victim suffered a physical injury or psychological harm.²⁸ The courts never self-corrected their draconian practices. It was only in 2007 when the legislature intervened to abolish the cautionary rule,²⁹ and prohibited judges from considering factors like the victim’s previous

²⁴ *Hansard*, 13 March 1989, cols. 2676–77, quoted in Kaganas (n 22) 291.

²⁵ Prevention of Family Violence Act 133 of 1993, s 5.

²⁶ *S v Balhuber* [1986] ZASCA 105, unreported judgment, 25 September 1986.

²⁷ *S v Mvamvu* [2005] 1 ALL SA 435 (SCA) para 16; *S v Moipolai* [2004] ZANWHC 19; unreported judgment, 20 August 2004, para 24; *S v Modise* [2007] ZANWHC 73; unreported judgment, 9 November 2007, paras 19–22. These judgments echoed sentiments expressed in pre-Constitution case law from the Appellate Division. See *S v N* 1988 (3) SA 450 (A) at 465H–466A (the Chief Justice wrote that a mitigating factor is that ‘the shock and affront to dignity suffered by the rape victim would ordinarily be less in the case where the rapist is a person well-known to the victim [...] the lack of any serious injury to the complainant and the fact that she was evidently a woman of experience from the sexual point of view, justice would be served by a suspension of half the sentence imposed’).

²⁸ *S v Adriaanse* [1994] 4 All SA 206 (A).

²⁹ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 60.

relationships, the apparent lack of physical injury, and the victim's previous sexual history as mitigating factors.³⁰

Today, one fifth of all adult women will experience some form of domestic violence, and one out of fifteen women will suffer from an act of sexual violence by an intimate partner.³¹ Domestic violence is inversely correlated to economic wealth. Women who own property and have the financial means to support themselves are far less likely to experience domestic violence, or at the very least will have the means to remove themselves from acts of violence.³² It is for this reason that the South African government has concluded that the economic emancipation of women is a top priority in their strategy to combat domestic violence.³³ The attainment of this goal is still far off. Women are more likely to be unemployed, and, if employed, they are estimated to earn one quarter less than men.³⁴

3 Legislation as the primary remedy

The African National Congress (ANC), which served as one of the main liberation movements against apartheid South Africa, recognised the imperative of implementing an aggressive social programme to remedy poverty, gender inequality, and economic disparity skewed along racial lines. The ANC feared, however, that their commitment to a constitutional democracy that prioritised the protection of human rights would frustrate these goals. Based on experiences from other constitutional democracies, there was a perennial concern that the courts would come to adopt negative-liberal interpretations of constitutional rights (i.e. freedom from external interferences) that would prevent the soon-to-be-governing ANC from pursuing their law-reform agenda.³⁵ To guard against such an outcome, the ANC sought to carve out exceptions to liberty rights. They did so

³⁰ Criminal Law (Sentencing) Amendment Act 38 of 2007, s 1.

³¹ Statistics South Africa, *South Africa Demographic and Health Survey 2016*, Report No. 03-00-09, 15 May 2017, 54–57, 72.

³² South African Government, Department of Women, *The Status of Women in the South African Economy*, August 2015, 139–140.

³³ *ibid* 141.

³⁴ *ibid* 70.

³⁵ A prominent example is the overturned decision of *Lochner v New York* (1905) 198 US 45. The US Supreme Court invalidated employment legislation that limited the amount of hours an employee of a bakery could work on the ground that such a law limited the freedom to contract, as safeguarded by the due process clause of the Fourteenth Amendment.

by formulating constitutional rights in a way that would empower the state to take measures that would otherwise be restricted in a liberal constitutional democracy built purely on negative freedoms.³⁶ Three prominent examples from the final Constitution are summarised below.

- *Affirmative action.* Section 9 of the Constitution guarantees that each person is equal before the law and prohibits the state from unfairly discriminating on any protected ground including race and gender.³⁷ A liberal reading of the equality clause — that is, the equality clause only guards against state interference — would preclude government from passing laws that provide preference to one protected group over another. The history of South Africa and the goals of the South African Constitution made such an outcome inappropriate. Although unfair discrimination is prohibited, section 9(2) nevertheless permits the state to adopt affirmative action legislation as a means to remedy the consequences of past discrimination. Pursuant to this permission, the legislature promulgated the Employment Equity Act³⁸ and the Broad-Based Black Economic Empowerment Act,³⁹ which provide varying degrees of preferential treatment in the economic and labour market to three previously disadvantaged groups, namely black people (defined to include Africans, Coloureds, and Indians), women, and disabled persons.
- *Land redistribution.* Section 25 of the Constitution prohibits the state from arbitrarily depriving a person of their property. It further makes the expropriation of privately owned property contingent on the payment of ‘just and equitable’ compensation. In addition to limiting the action of the state, the property clause mandates legislative action. Section 25(7) orders the state to remedy the inequitable distribution of land on account of past discriminatory laws. The provision provides that a person or community dispossessed of property after the date the Natives Land Act took effect ‘as a result of past racially discriminatory law or practices is entitled, to the extent provided by an

³⁶ Heinz Klug, *Constituting Democracy* (CUP 2010) 88–90.

³⁷ For all of the listed grounds, see sec 8.2 below.

³⁸ 55 of 1998.

³⁹ 50 of 2003.

Act of Parliament, either to restitution of that property or equitable redress'.⁴⁰

At the commencement of the final Constitution, the state had already enacted the Restitution of Land Rights Act.⁴¹ The legislative scheme sets up a framework to provide persons and communities, including their direct descendants, either the restitution of their land or equitable compensation in lieu of that land. Furthermore, section 26(6) requires the promulgation of national legislation to secure land tenure rights. The provision provides that a 'person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to a form of tenure which is legally secure or to comparable redress'.⁴² This constitutional mandate is given effect through the Extension of Security of Tenure Act⁴³ and the Communal Property Association Act.⁴⁴

- *Prevention of domestic violence.* In addition to enshrining the equal protection of the law and the prohibition of discrimination on the grounds of sex, gender, and marital status, section 12(1)(c) of the Constitution guarantees everyone the right 'to be free from all forms of violence from either public or private sources'. The express inclusion of 'private sources' ensured that the state would have the authority to intervene in private spaces that have historically proven thorny (i.e. the family home). The legislative translation of this constitutional imperative is found in the Domestic Violence Act, which provides persons at risk of domestic violence an array of injunctions, including protective orders on short notice and orders directing that a potentially abusive spouse be excluded from the joint home.⁴⁵

⁴⁰ The Natives Land Act took effect on 19 June 1913. See also Constitution s 25(9) ('Parliament must enact the legislation referred to in subsection (6)').

⁴¹ 22 of 1994. The interim Constitution of the Republic of South Africa Act 200 of 1993, s 121(1) required an Act of Parliament to provide for matters relating to the restitution of land rights.

⁴² Constitution s 25(4)(a) recognises that expropriation of property is part of 'the nation's commitment to land reform'.

⁴³ 62 of 1997.

⁴⁴ 28 of 1996.

⁴⁵ 116 of 1998, ss 5, 7(1).

4 **Horizontality as the supporting remedy**

Though the ANC viewed legislation as the primary tool to remedy the wicked effects of apartheid laws, there was a belief amongst the socialist-leaning members of the party that legislation alone would prove insufficient. The ANC feared that their envisaged social programmes — geared towards land redistribution, economic growth within historically disadvantaged groups, and the protection of vulnerable groups — would be blocked or frustrated by private law rights (as well as liberal constitutional rights). Their fear stemmed from the observation that private actors enjoy the capacity to wield a considerable amount of power in any society built upon a market economy, and that private common law rights and liberal constitutional rights largely insulate this economic power from public regulation. The goal of growing wealth within historically disadvantaged groups would be undermined if private individuals and entities were permitted to use their rights to exclude another from economic opportunities on the basis of race or gender.⁴⁶ The ANC therefore advocated a constitutional rights framework that imposed a degree of control over the actions of private individuals and entities. The horizontal application was mooted not only as a means not to prevent acts of discrimination, but, more importantly, as a way to insulate the envisaged legislative law-reform initiatives from judicial obstruction.

The intention was clear. The mechanisms for doing so were not. The question as to whether, and, if so, to what extent, constitutional rights would apply to private individuals and entities would come to consume a considerable amount of debate during the drafting of the interim and final South African Constitution.⁴⁷ A large portion of these discussions centred on determining the respective roles of the legislature and the judiciary in giving effect to the constitutional obligations of private individuals and entities. The drafting history of the interim and final South African Constitution traces

⁴⁶ Albie Sachs, *Protecting Human Rights in a New South Africa* (OUP 1990) 157 (the constitutional regulation of private law prevents a ‘privatised apartheid’; democracy alone is insufficient because the resources needed to improve the lives of the poor black majority would remain constitutionally ‘under white lock and key’ if human rights applied only vertically).

⁴⁷ Political leaders agreed to a two-stage negotiating process. Immediately following the fall of apartheid, political reality suggested that there was little opportunity for a democratically elected body to negotiate a new Constitution. The plan was therefore to negotiate an interim Constitution amongst all major political parties, and once democratic elections had taken place, a representative body would negotiate the final Constitution. The interim Constitution would however set out 34 principles with which the final Constitution had to adhere.

how the enforcement mechanisms shifted the emphasis onto legislative authority in order to limit judicial law-making powers.⁴⁸

5 Drafting the interim Constitution

In November 1993, twenty-six political parties and other political groups convened to start the process of negotiating a transitional Constitution. They called themselves the Multi-Party Negotiating Forum (MPNF), and, over time, the MPNF delegated most of the negotiations and administrative work to an array of sub-committees. Figure 2 sketches the relationship between the committees involved in negotiating the chapter on constitutional rights.

⁴⁸ On the permissible use of drafting history to interpret constitutional provisions, see *S v Makwanyane* 1995 (3) SA 391 (CC) paras 15–18.

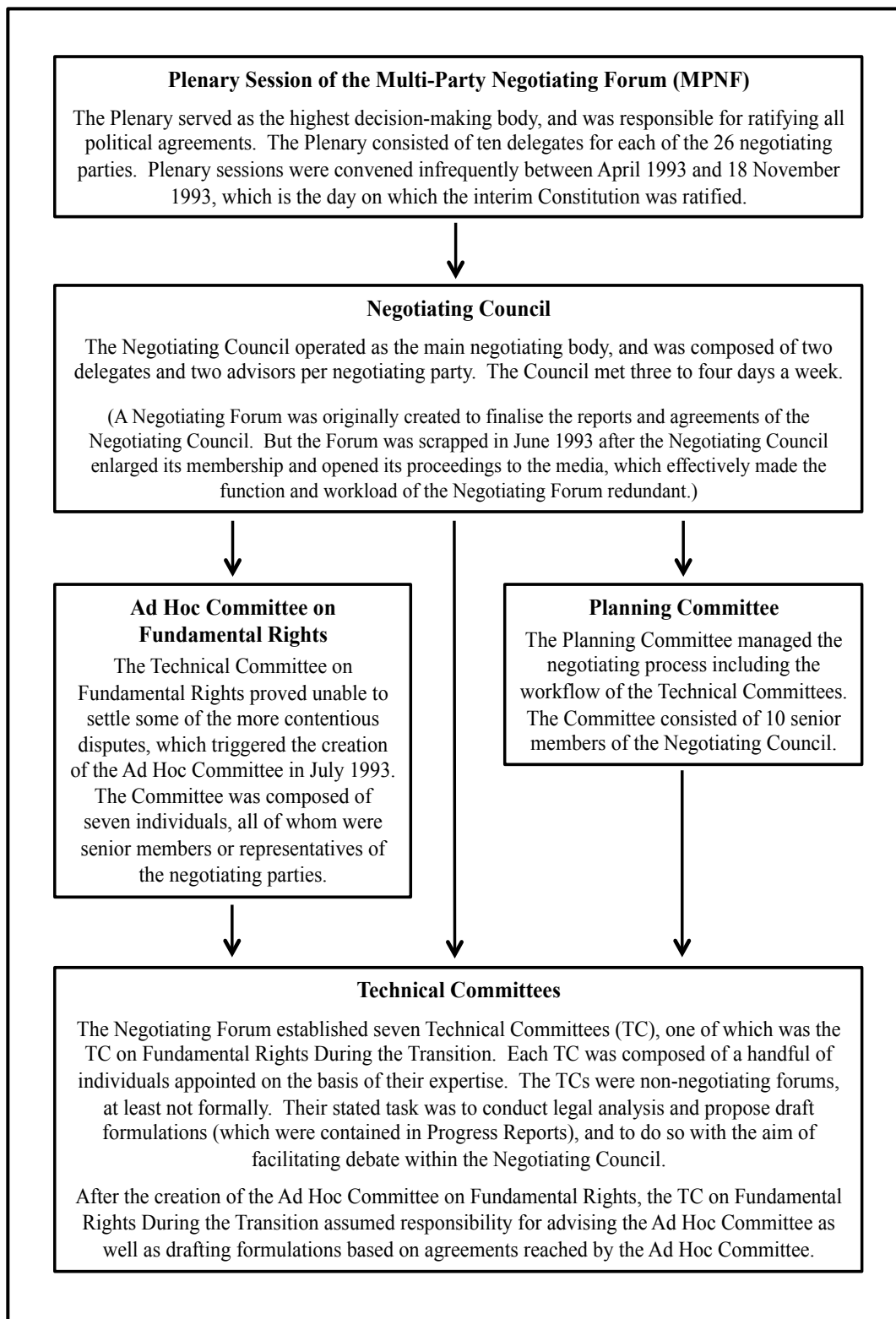


Figure 2: Structure of the MPNF (pertaining to the negotiation of constitutional rights)

The Fifth Progress Report of the Technical Committee on Fundamental Human Rights During the Transition (Technical Committee) contained the first formulation of the horizontality provision.⁴⁹ The Committee proposed that—

The provisions of this Chapter shall—

- (a) bind the legislative, executive, and judicial branches of government at all levels as well as the statutory bodies and functionaries; and
- (b) bind, where appropriate, all social institutions and persons.⁵⁰

The Report reflected the starting position of the ANC.⁵¹ Over the course of negotiations, however, the ANC's position in favour of a pro-horizontal Constitution weakened. Two main factors changed their view.

First, the pro-horizontal camp of the ANC met a forceful match. The National Party (NP), which was still the governing party, strongly opposed horizontality. They argued that fundamental rights should burden only state actors because the sole purpose for entrenching constitutional rights is to guard against excessive government actions.⁵² Horizontality disrupted their classically liberal reading of human rights. Their position was not purely principled. The NP understood that they would lose a considerable amount of political power after the first democratic elections, and feared that the social programme planned by the ANC would negatively impact upon the economic interests of their core constituents (who were mostly white Afrikaners). The NP's negotiating objective was therefore to secure the greatest amount of personal freedom from state

⁴⁹ The Technical Committee on Fundamental Human Rights comprised five non-political academics and practitioners, namely Hugh Corder, Lourens du Plessis, Gerrit Grové, Sbongile Nene, and Zac Yacoob.

⁵⁰ Technical Committee on Fundamental Rights During the Transition, *Fifth Progress Report*, 11 June 1993, sec 1(1).

⁵¹ *ANC Draft Bill of Rights*, March 1993 at 29, which stated that the forthcoming bill of rights 'shall be binding upon the State and organs of government at all levels, and where appropriate, on all social institutions and persons'. The ANC took inspiration from the Constitution of the Republic of Namibia, 1990 which, to the knowledge of the drafters, was the only national constitution in the world to contain an express horizontality provision. Article 5 of the Namibian Constitution states that '[t]he fundamental rights and freedoms in this Chapter shall be respected and upheld ... and, where applicable to them, by all natural and legal persons'.

⁵² *Government's Proposals on a Charter of Fundamental Rights*, 2 February 1993, at 1. The NP-led government proposed that the interim Constitution should give rights to citizens against 'all legislative, executive and judicial institutions, bodies and functionaries at central, regional and local government level'. Their position was informed by the proposals contained in SALC, *Project 58: Interim Report on Group and Human Rights*, August 1991. The Law Commission advised that the forthcoming bill of rights should only bind the executive and the legislature, which was premised on the belief that rights should only safeguard against state interference and not restrict private activity. See discussion in Klug (n 36) 86–88.

interference.⁵³ Horizontality threatened this strategy. But their position was not absolute. The NP submitted to the negotiating forum that the forthcoming Bill of Rights should bind the judiciary to ensure that rights have a limited ‘overflow’ into private law.⁵⁴ The available documents do not fully elaborate on this proposal, but it appears that the NP was comfortable with the ‘indirect’ horizontal effect model that had been adopted in Germany and Canada. Other pro-horizontal political parties cautioned against the broad approach submitted by the ANC. The Democratic Party (DP), for instance, argued that a more structured and detailed application provision had to be negotiated. In their view, the Fifth Progress Report expressed a formulation that was formless and unpredictable.⁵⁵

The ANC required the support of other political parties, and, at least for the purposes of the transition, the ANC was willing to concede ground. It was not only a concession, however. The ANC would come to support parts of the logic of the NP and DP. In their subsequent submission to the MPNF, the ANC wrote that the primary purpose of fundamental rights should indeed be to ‘limit the government from passing laws or using its executive powers in conflict with those rights’.⁵⁶ This did not have to be the only purpose, but, if exceptions to the general rule were to be introduced, there would have to be wider consultations to identify the conditions under which rights would bind non-state actors.⁵⁷ The due date for the finalisation of the interim Constitution was approaching, and the political appetite within the ANC to negotiate exceptions was waning. The debate over the precise scope of horizontality would have to wait for the final Constitution.

Second, the pro-horizontal camp feared that horizontality would yield unintended consequences. For many ANC members — including members in their alliance partner, the South African Communist Party (SACP) — there was no desire to afford the courts an unfettered discretion to apply constitutional rights to private law or private actors. In fact,

⁵³ Richard Spitz, *The Politics of Transition* (Hart 2000) 269.

⁵⁴ *Government's Proposals on a Charter of Fundamental Rights* (n 52).

⁵⁵ *Freedom Under the Rule of Law Advancing Liberty in the New South Africa: Democratic Party Draft Bill of Rights*, May 1993 at 1. The DP submitted that the bill of rights ‘shall be respected and upheld by all organs of the State and government, whether legislative, executive or judicial and, where applicable, by all persons in South Africa’. The DP’s support for horizontality is somewhat surprising given that the party prescribes to liberal politics (i.e. the DA supports limited government and an open market). Their legal advisor, Etienne Mureinik, convinced the party to support a pro-horizontal position because of his belief that the Constitution should instil a ‘culture of justification’ in both government and society. See Spitz (n 53) 269.

⁵⁶ Spitz (n 53) 270.

⁵⁷ *ibid.*

their intention was the exact opposite. Horizontality was advocated as a means to subdue the courts and protect the law-making authority of the legislature. The overall sentiment was that imposing constitutional obligations upon private individuals and entities would carve out exceptions to negative-liberal rights, which would preclude private actors from invoking (and ultimately the courts from applying) constitutional rights in a manner that prevents the legislature from pursuing social reform. But the Fifth Progress Report phrased the horizontal application clause in general and open terms, raising concerns that the application clause would grant an unfettered power to the courts to regulate private legal relationships. This was particularly problematic as there was zero guarantee that the judiciary's vision of horizontality would square up with the policy position of the soon-to-be-governing ANC.⁵⁸ The party mistrusted the courts because the judiciary was still composed of judges appointed under the apartheid order. There would be no stopping the courts from applying an openly phrased application clause in a manner that would allow economically powerful actors to invoke horizontality to their advantage.⁵⁹ A corporation, for instance, could use their liberty rights to ward off attempts to introduce fair labour practices. In other words, there was a possibility that horizontality would lead to an outcome that it was meant to prevent.

Fears over the unintended consequences resulted in a turning point. The SACP negotiating member on the Ad Committee for Fundamental Rights submitted that legislative intervention was a far more appropriate means to achieve the aims of the pro-horizontal camp. Instead of a horizontal application clause that effectively afforded courts law-making powers, the member argued that a provision should be inserted into the interim Constitution to the effect that no constitutional right may prevent the introduction of legislation designed to end discrimination in the private sphere.⁶⁰ Though the idea of legislation was raised as an alternative to an openly phrased horizontality clause, the proposal was not debated with any seriousness. The proposal did however ignite a spark, which would flare up as the negotiations proceeded.

The Sixth Progress Report echoed the revised position of the ANC.⁶¹ The 'judiciary' was removed from the first part of the application clause. The Chapter on

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ *ibid* 271. The SACP's legal advisor was Halton Cheadle

⁶¹ Technical Committee on Fundamental Rights During the Transition, *Sixth Progress Report*, 15 July 1993.

Fundamental Rights would therefore only bind the two elected branches of government. The second part of the application was also amended. The phrase ‘bind, where appropriate, social institutions and persons’ was deleted, and replaced with ‘bind other bodies and persons to the extent *expressly* provided for in this Chapter’.⁶² The scope for horizontality narrowed. In fact, the scope for horizontality was zero because the Report did not identify any constitutional rights that would find application to non-state actors. The negotiating parties had no formal or meaningful discussions on the rights that would find horizontal application. In the accompanying notes to the revised provision, the Technical Committee told the negotiating parties that their request to identify applicable rights remained unanswered, and, should the parties fail to do so, the entire second clause of the application provision would be removed. In other words, the Bill of Rights would apply only vertically.

The Sixth Progress Report once more failed to satisfy the ANC. The party was becoming more alarmed at the prospect of judicial discretion, and feared that merely removing the judiciary from the application clause would prove insufficient to curb judicial power. The ANC identified a new concern. It feared that constitutional provisions would become ‘self-enforcing’. Private litigants would merely request the courts to provide constitutional remedies, which would altogether exclude Parliament from the law-rebuilding project. The horizontal application of constitutional rights would effectively limit government action, and potentially result in the judiciary creating laws that clashed with the envisaged economic legislative schemes.

The fears over an unfettered horizontality provision continued to take hold within the ANC. Instead of offering creative solutions (like the one recommended by the SACP) and entering into constructive negotiations over the scope of horizontality, the ANC stopped actively supporting the inclusion of horizontality. Their fears and doubts over horizontality pushed the ANC further towards the pro-vertical position of the NP.

Before the ANC produced their comments on the Sixth Progress Report, the Technical Committee published the Seventh Progress Report.⁶³ This too introduced major changes, which were necessitated because the political parties had failed to respond to the call of the Technical Committee to decide on the specific rights that would find

⁶² Own emphasis added.

⁶³ Technical Committee on Fundamental Rights During the Transition, *Seventh Progress Report*, 29 July 1993, sec 1(1).

horizontal application.⁶⁴ The Report reinserted ‘judiciary’ into the first subsection of the application clause. The updated version also removed ‘bind other bodies and persons to the extent expressly provided for in this Chapter’ from the second subsection, and, in its place, inserted the phrase that rights will ‘bind, *where just and equitable*, other bodies and persons’.⁶⁵ The Committee justified the change on the basis that it was best not to prescribe which rights find application between private individuals and entities. The new formulation, the Committee submitted, ‘leaves room for the evolutionary and natural development’ of the horizontal application of rights within legal doctrine.⁶⁶ In essence, the courts would be left to decide. The reason for the expansive and somewhat vague approach was clear. The Technical Committee sought to reconcile the competing views amongst political parties, including those conflicts that were emerging within the ANC and its alliance partners.

The Seventh Report proved a step too far, and attracted heavy criticism. Both the ANC and DP expressed displeasure with the phrase ‘just and equitable’. The DP argued that the formulation was too imprecise, and the proposed amendment further fuelled the growing fear within the ANC that horizontality would provide the judiciary with large amounts of unrestrained discretion, which, in turn, would exclude the legislature from the law-reform process. It bears noting that at this moment there was still no agreement on whether or not to create a new apex court. For the ANC, leaving the apartheid-appointed-courts with a law-making discretion was an unacceptable proposition. The NP remained committed to removing horizontality from the interim Constitution.

Public submissions hastened the retreat from horizontality.⁶⁷ Apart from women’s advocacy groups who supported the inclusion of horizontal application to help prevent domestic violence and gender discrimination in the workplace, nearly all of the submissions raised objections. The economically powerful Chamber of Mines latched onto the growing criticism of the ANC, and submitted that the phrase ‘just and equitable’ was vague and unworkable. The legal profession critiqued the proposal on similar grounds. Perhaps the most forceful argument against horizontality was issued by Chief Justice Michael Corbett. On behalf of the judiciary, the Chief Justice advised the

⁶⁴ Hugh Corder and Lourens du Plessis, *Understanding South Africa’s Transitional Bill of Rights* (Juta 1994) 111.

⁶⁵ Own emphasis added.

⁶⁶ *Seventh Progress Report* (n 63).

⁶⁷ Spitz (n 53) 273–74.

negotiating parties to scrap horizontality entirely.⁶⁸ He wrote that the application of constitutional rights to private actors would replace large parts of the common law, which, in turn, would cause unpredictable results and social insecurity. In its current form, the unqualified phrase ‘just and equitable’ would insert a great amount of uncertainty and confusion into the law.⁶⁹ The crux of the criticism raised by the Chief Justice was that horizontality would raise complex political, economic, and social questions. He advised that these were not legal issues amenable to judicial resolution, and should therefore not be left to the courts. The Chief Justice proceeded to offer a solution to reconcile the conflicting positions within the ANC. He noted that the primary reason for the debate on horizontal application was to eliminate certain forms of discrimination in the private sphere. To achieve this end, the Chief Justice advised the negotiating parties to stop discussing horizontality in abstract and general terms but rather to identify the ‘precise field of impermissible discrimination [...] from those areas of highly personal affairs where one should be free to choose one’s associates’.⁷⁰ The Chief Justice’s solution was not implemented, but the argument that the issues surrounding horizontality were polycentric and not amenable to judicial adjudication added further support to the pro-horizontal but anti-court camp.

On 31 August 1993, the Ad Hoc Committee on Fundamental Rights, which was the superior of the Technical Committee, accepted the swelling movement against horizontality, and resolved that ‘the whole Bill would operate vertically only’.⁷¹

A week later, however, horizontality was revived. The ANC representative on the Ad Hoc Committee requested that the issue be reconsidered. The representative reargued the starting position of the ANC, and the concern that a horizontal-free Constitution would permit a privatised apartheid to prosper. South African law is premised on a sharp distinction between private and public law, and insulating private law from constitutional control would allow many of the injustices of the apartheid legal system to continue. Given that the Ad Hoc Committee had already debated the issue at

⁶⁸ Chief Justice Michael Corbett, Memorandum Submitted on Behalf of the Judiciary of South Africa on the Draft Interim Bill of Rights, 3 September 1993, summarised in Spitz (n 53) 274–75.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ Combined Meeting of the Ad Hoc and Technical Committees, 31 August 1993, at 2. The Ad Hoc Committee on Fundamental Rights was composed of Sheila Camerer (NP), Halton Cheadle (SACP), GW Gwadiso (traditional leaders), Tony Leon (DP), and Samuel Mothibe (Bophuthatswana government).

length and resolved not to write horizontality into the interim Constitution, the Committee requested the pro-vertical SACP member and pro-horizontal ANC member on the Ad Hoc Committee to resolve the dilemma amongst themselves and propose a solution.⁷²

Their private discussions led to a compromise. The application clause would bind neither the judiciary nor any non-state entity. The Tenth Progress Report recorded that the Chapter on Fundamental Human Rights would bind only ‘the legislative and executive organs of the State at all levels of government including all statutory bodies and functionaries.’⁷³ The Report nevertheless noted that the Chapter would find ‘limited application’ to those bodies not listed in the application clause (i.e. private individuals and entities). This was on account of two new provisions.

- *The limitation clause.* A provision in the limitation clause was inserted to provide that ‘[n]othing in this Chapter shall preclude measures designed to prohibit unfair discrimination by bodies and persons other than those’ mentioned in the application clause.⁷⁴ The genesis of this provision stemmed from the comments received on the Sixth Progress Report, and, more specifically, the earlier proposal of the pro-vertical SACP member to champion legislation over judicial law-reform.
- *The interpretation clause.* A provision was inserted into the interpretation clause that read that in ‘the interpretation of any law and the application and development of the common and of customary law, a court shall have due regard to the spirit, purport and objects of this Chapter’. This interpretation clause, the Technical Committee advised, would allow for the ‘seepage’ of fundamental rights into the law that regulates private legal relationships.⁷⁵ Although this type of clause was unique to constitutional texts, it was inspired by the indirect horizontal application model developed in German constitutional theory.

⁷² Spitz (n 53) 276.

⁷³ Technical Committee on Fundamental Rights During the Transition, *Tenth Progress Report*, 1 October 1993, sec 7.

⁷⁴ (Interim) Constitution s 14 also permitted, though did not mandate, the state to enact legislation. This too stemmed from concerns that an otherwise liberal constitution would prohibit the state from acting. The provision allowed the legislature to recognise marriages concluded under religious laws.

⁷⁵ *Tenth Progress Report* (n 73), sec 36.

The compromise, initially reached between opposing members of the ANC and the SACP, also satisfied the NP and DP. The interim Constitution would allow a democratically elected legislature to pass non-discriminatory laws in the private sphere. The ANC was therefore able to achieve what it initially intended to do with horizontality. Private discrimination would be outlawed, albeit at a future point once legislation had been enacted, and it would be the soon-to-be-ANC-controlled legislature promulgating this anti-discrimination law. As for the interpretation clause, the NP was never opposed to a limited 'overflow', and the limited application model also satisfied the DP as a sufficiently structured and workable framework. The influence of the interim Constitution would take place incrementally within the already existing fabric of the private common law. One cannot but conclude that the obligation on the courts to merely 'have due regard' to the Constitution was intentionally vague so as to provide both sides a partial victory. The pro-horizontal camp was afforded an opportunity to plead to the courts for the development of the law in line with Constitution. On the other hand, however, the duty upon the courts to merely have regard to the Constitution seems weak, potentially having no appreciable influence. This duty to consider (but possibly not obey) was meant to calm critics who believed that horizontality would result in uncertainty and the removal of large parts of the law. After having regard to the Constitution, the courts could easily reject its influence on the basis of incompatibility or irrelevance.

Outside of the Ad Hoc Committee, however, some ANC members were displeased with the compromise. The ANC's Commission on the Emancipation of Women protested that the interim Constitution was now too weak. In their view, the Constitution ought to provide all of the tools necessary to cure racial and gender discrimination in the private sphere.⁷⁶ As it stood, the Constitution did not mandate the creation of antidiscrimination laws. Such legislation would be merely permitted. Victims of private discrimination would have to wait for the promulgation of legislation before they were entitled to a remedy. Also, if enacted, there was no guarantee that the legislation would provide effective tools to protect women in both the economy and family home. The ANC and SACP members on the Ad Hoc Committee however were not persuaded by these arguments, believing that their concerns were adequately addressed given that the interim Constitution as it stood prohibited gender discriminatory laws.

⁷⁶ Submission on 13 October 1993, discussed in Spitz (n 53) 278.

The formulations contained in the Tenth Progress Report, subject to a few stylistic amendments, proved final. On 27 April 1994, the day of South Africa's first democratic elections, the (interim) Constitution of the Republic of South Africa Act 200 of 1993 took effect.

6 Judicial application of the interim Constitution

The interpretation clause produced contradictory judgments. Some held that the Constitution did not prohibit the 'unqualified' application of rights.⁷⁷ That is, constitutional rights could find direct application between private individuals and entities. Other judgments adopted the middle ground, and concluded that the interpretation clause 'informs all legal institutions and decisions with the new power of constitutional values'⁷⁸ and imposed a duty upon the courts to 'scrutinise' whether the common law accords with the demands of the Constitution.⁷⁹ The interpretation clause therefore required the courts to 'blend' constitutional rights into the common law in order to achieve a 'harmonious amalgam'.⁸⁰ That the interim Constitution influenced the application and development of the common law was undisputed, but most of these middle-ground-judgments remain somewhat vague on the precise force and extent to which right norms apply to the common law. Do these norms merely flow through the common law allowing for the development of the law in an incremental manner and in accordance with the internal logic of the common law (i.e. does the common law constrain the application of the Constitution to private law), or do they break and remould the common law to ensure adherence with the supreme law? The ambiguity in these judgments is somewhat understandable, given the drafting history and the compromise that yielded an imprecise formulation. Another handful of judgments adopted a highly conservative interpretation, and held that the interpretation clause was only meant to apply to those parts of the common law that regulate the state's interaction with private individuals. The interim Constitution thus had no bearing whatsoever on the private common law.⁸¹

⁷⁷ *Mandela v Falati* 1995 (1) SA 251 (W) at 257H-258E.

⁷⁸ *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W) at 598D.

⁷⁹ *Gardener* (n 16) 686B. At 685C-D, the judgment held that some constitutional rights might necessitate direct application in particular instances.

⁸⁰ *Motala v University of Natal* 1995 (3) BCLR 374 (D)

⁸¹ *De Klerk v Du Plessis* 1994 (6) BCLR 124 (T) at 131F-G; *Potgieter v Kilian* 1995 (11) BCLR 1498 (N).

The only judgment of the Constitutional Court on the interpretation clause also failed to produce a unanimous reading. Though none of the judges viewed the interpretation clause as an ‘on/off switch’, the seven opinions written offered varying intensities on the scope of horizontality. These ranged from robust and aggressive interpretations to ones more incremental and reserved.⁸² It is not necessary to discuss all of the opinions, but the judgment of Sachs J is of particular interest. Prior to his appointment to the Constitutional Court, Albie Sachs served as one of the chief negotiators on behalf of the ANC. His judgment neatly sums up the position of the ANC. In response to some of his colleagues’ belief that the judiciary should apply horizontality forcefully to ensure that private actors do not exercise their common law rights in an abusive and discriminatory way, Sachs J remarked that the issue over horizontality is ‘not about our commitment to the values expressed by the Constitution, but about which institutions the Constitution envisages as being primarily responsible for giving effect to those values’.⁸³ The Constitution does not contemplate a—

dikastocracy within which Parliament has certain residual powers. The role of the courts is not effectively to usurp the functions of the legislature, but to scrutinize the acts of the legislature. It should not establish new, positive rights and remedies on its own.⁸⁴

Applying this dictum to private acts of discrimination, Sachs J remarked that it would be ‘inappropriate’ for the courts to resolve disputes without the assistance of a legislative framework.

Litigation is a clumsy, expensive and time-consuming way of responding to multitudinous problems of racist behaviour. [...] Widespread research and consultation would be needed to decide precisely where to establish the cut-off point in each situation [...]. It is Parliament, and not the courts, that investigates these matters and decides on appropriate interventions and remedies.⁸⁵

The judgment of Sachs J appears to be the only piece of judicial writing under the interim Constitution that paid respect to the end position of the ANC (and accepted by other major parties). That is, the Constitution carves out a primary and central role for rights legislation within the private sphere, particularly for legislation that aims to prevent

⁸² *Du Plessis* (n 16) paras 60, 85, 106, 122, 165, 174, 181.

⁸³ *ibid* para 190.

⁸⁴ *ibid* para 181.

⁸⁵ *ibid* para 186.

unfair discrimination. Yet, as the women rights groups feared, the legislature never passed general antidiscrimination legislation during the operation of the interim Constitution.

7 Drafting the (final) Constitution

The Constitutional Assembly, which was the main body responsible for negotiating the final Constitution, began their task shortly after the 1994 democratic elections. Like the process for negotiating the interim Constitution, the Constitutional Assembly delegated most of their responsibilities to a series of sub-committees. Figure 3 sketches the hierarchy and responsibility of the committees that were involved in negotiating the chapter on constitutional rights.

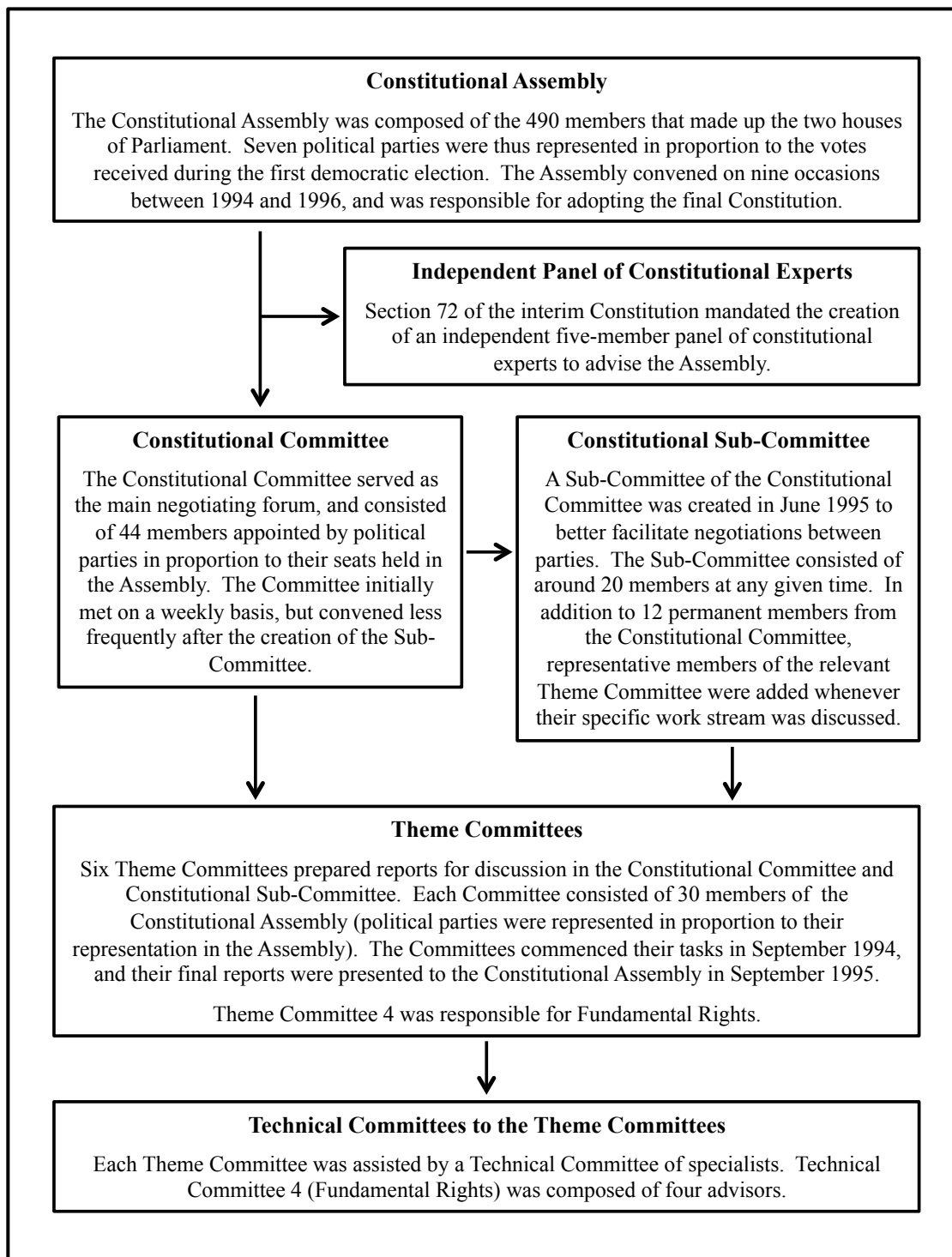


Figure 3: Structure of the Constitutional Assembly (pertaining to the negotiation of constitutional rights)

Horizontality proved less divisive during the drafting of the final Constitution. Four reasons explain the growing consensus amongst political parties.

First, the interim Constitution reflected the lowest common denominator, and all of the major political parties agreed to retain the compromise. The first draft of the Chapter on Fundamental Rights copied the interpretation clause of the interim Constitution.⁸⁶ There was however one major difference. The obligation upon the courts to ‘have due regard’ under the interim Constitution was replaced with the seemingly stronger obligation to ‘promote’. The publicly available documents unfortunately do not elaborate on the precise cause for this word change. Apart from a few other minor changes,⁸⁷ the proposal would eventually be enshrined in section 39(2) of the adopted text. The final version of the interpretation clause provides:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

Although the clause initially stemmed from a compromise between the pro-vertical and pro-horizontal camps, the Technical Committee rearticulated the goal of an interpretation clause within a constitutional democracy. Pre-1994, and particularly towards the end of apartheid, judicial interpretation was often criticised for being executive-minded and ‘purely mechanical’. The problem with this formalistic approach, the Technical Committee explained—

led to a lack of confidence in the judiciary. The judiciary, like the executive and the legislature, increasingly came to be seen as an illegitimate institution of the apartheid state. When transition came there was therefore widespread agreement that a new court was needed to act as guardian for a democratic Constitution — hence the Constitutional Court. But this was not enough to ensure that the new Constitution would be protected. In addition a provision was included in the Bill of Rights directing judges, mostly schooled in apartheid jurisprudence, to adopt a different approach to interpretation, particularly to the interpretation of the Constitution itself. This approach [...] gives constitutional recognition to the values of Roman-Dutch law and contemporary human rights jurisprudence and directs that they be applied in the interpretive process. [...] [The interpretation clause] seeks to redress the agony of our past and to commit our law

⁸⁶ Constitutional Committee Sub-committee (Theme Committee 4, Fundamental Rights), *Draft Bill of Rights – Volume Two, Formulations*, 9 October 1995.

⁸⁷ In subsequent drafts, the duty upon the courts was extended to cover tribunals and other legal forums.

and its institutions to a future in which discrimination and repression have no place. It is a provision which enjoyed full support in the [interim Constitution] negotiations.⁸⁸

Section 39(2) redefines the role of judges, not as scientists who discover and declare the ‘intention of the legislature’ but as artists taking inspiration from the ideological undercurrents that animate the provisions of Constitution. The interpretation clause guards against the common law operating in the way it had under apartheid. No longer would this body of law remain blind to structural inequality or facilitate practices of private discrimination.

But criticisms nevertheless persisted that value-based reasoning invites an untrammelled amount of judicial discretion. The Technical Committee disagreed, and advanced a powerful justification for including an interpretation clause within South Africa’s new constitutional order. The process of adjudication inevitably requires the exercise of judicial discretion (and apartheid courts certainly exercised discretion when they followed executive-minded approaches). Instead of enabling an unrestrained discretion, the interpretation clause serves to control the exercise of this discretion, as it provides a guiding structure to the courts on how law should be interpreted and developed. While the process of judicial interpretation may result in new law, judges ‘are not free to make law as they please’.⁸⁹ Judges are only permitted to act within the limits and values of the Constitution, and the interpretation clause both informs and constrains the powers of the courts because it introduces an ‘honesty and openness about the nature of the judicial role ensur[ing] a new accountability on the part of the judiciary.’⁹⁰

The first draft also retained within the limitation clause the provision permitting the state to enact antidiscrimination legislation. The provision would however not survive the final version. Explained below, the provision would morph from a permission to pass antidiscrimination legislation into an obligation to do so.

Second, the power dynamics within the negotiating assembly altered fundamentally. The interim Constitution was primarily negotiated between two

⁸⁸ Constitutional Committee Sub-committee (Theme Committee 4, Fundamental Rights), *Draft Bill of Rights – Volume One, Explanatory Memoranda*, 9 October 1995, at 279–80. For a brief overview of the Appellate Division’s executive-minded approach under apartheid, see Christopher Forsyth, *In Danger for Their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–80* (Juta 1985) 225–26.

⁸⁹ *ibid* at 282, citing with approval the decision of *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SECLD) at 597I–98B.

⁹⁰ *ibid*.

organisations — the African National Congress and the National Party — each wielding a similar level of political influence. A democratically elected body, on the other hand, approved the final Constitution. The ANC secured more than 60 per cent of the national vote in the first democratic elections, which provided the now-governing ANC with an immense amount of muscle during the negotiation process. The ANC effectively enjoyed a veto over any proposal. Though the party sought to reach unanimity where possible, the ANC had no pressing need to compromise. Their focus was on long-term strategies and not transitional arrangements.⁹¹ In sum, despite continued resistance, the ANC was in position to implement their initial plan to ensure that fundamental rights exercised a certain level of control over private law.⁹² As a result, the first draft reflected the opening position of the ANC at the time of negotiating the interim Constitution. The application clause provided that the Bill of Rights binds the ‘judiciary’ and ‘where applicable, binds all natural and legal persons’.⁹³

To secure support for the application clause, the technical legal advisors to the Theme Committee on Fundamental Rights advised the negotiating parties as well as other interest groups that the inclusion of the ‘judiciary’ and ‘natural and legal persons’ would not lead to large amounts of disruption and unpredictability.⁹⁴ The advisors supported

⁹¹ Spitz (n 53) 268–85.

⁹² The Democratic Party supported the retention of horizontality, believing that no arbitrary lines should be drawn between state and social power and accordingly the forthcoming Constitution would have to address the use and justification of all power. The DP cautioned however that the issue must be considered carefully, which requires an audit of each of the constitutional rights provisions to ensure that horizontality does not ‘lead to gross injustices, impractical anomalies, or absurd consequences’. See Democratic Party, *Submission: Block Two – Theme Committee 4*, 16 February 1995, item 3.4. The National Party still favoured a model of constitutional rights that is predominantly vertical but nevertheless allows all areas of the law to be ‘equally influenced by the letter and spirit of the bill of rights’. See National Party, *Theme Committee 4: National Party Proposals Regarding Constitutional Principle II (Fundamental Rights and Freedoms)*, 23 January 1995, item 8. See also SALC, *Project 58: Final Report on Group and Human Rights*, October 1994, 124–25 (the Law Commission advised the negotiating parties not to extend the operation of the bill of rights ‘beyond the vertical level’ except as provided for in the interim Constitution).

⁹³ Consolidated Draft, 19 October 1995. The Draft provided that the ‘Bill applies to all law and binds the legislature, the executive, the judiciary, and all other organs, institutions, and agencies of the state at every level and, where applicable, binds all natural and juristic persons’. The Fourth Working Draft, dated 20 March 1996, split the application provision into state actors and non-state actors. The second sub-clause provided that the ‘Bill of Rights binds all natural and juristic persons, if applicable’.

⁹⁴ Most public submissions either opposed horizontality or argued for a limited and specified horizontal application of constitutional rights. The SALC, the Law Society of South Africa, the Chamber of Business, Business SA, and the South African Agricultural Union all opposed the proposed formulation in the final Constitution. It was mostly women advocacy groups, like the Reproductive Rights Alliance and Planned Parenthood, that supported horizontality as it secured an important step towards protecting women in the private sphere. See summary of submissions received in response to Working Draft, 22 November, which was distributed in January 1996.

their conclusion with the body of case law that had started developing under the interim Constitution pertaining to the type of remedies available to litigants.⁹⁵ Most courts had recognised the wisdom of limiting constitutional disputes, and, as a result, required litigants to locate remedies within existing subordinate sources of law.⁹⁶ A plea to create new remedies to vindicate a constitutional right would only be entertained if there were no appropriate remedies to be found in statutes, the common law, or customary-indigenous law.⁹⁷ The advisors predicted this trend would apply to the private common law. This subordinate source of law already protected many of the interests safeguarded by constitutional rights, which meant that the horizontal application clause would only be applicable in those few instances where the pre-existing law did not already provide adequate relief. Furthermore, given that the courts prefer litigants to locate remedies within subordinate sources of law, the advisors inferred that the courts would most probably extend common law remedies to meet any constitutional demands as opposed to creating an entirely new system of rights and duties.⁹⁸ The advisors underscored their view by noting that the proposed horizontal application clause does not invite an unfettered judicial application, as the clause provides no indication as to the extent of application. The phrases ‘judiciary’ and ‘where applicable, binds private all natural and legal persons’ does not imply that the courts enjoy a power to apply rights to private law in an ‘artificial’ and ‘totally unqualified way’.⁹⁹ The authority of the judiciary depends on the extent to which a constitutional right can in fact be applied to private legal relationships.¹⁰⁰ The nature of rights and their applicability to private legal relationships would thus act as natural constraints on any judicial law-making powers.

Third, the scope of horizontality was not debated in general and abstract terms. Reflecting on their experience during the drafting of the interim Constitution, the Theme Committee believed that discussing horizontality without a specific context in mind had caused the negotiating parties to debate horizontality as a binary issue (i.e. either no or full horizontality). The Committee instead focused on individual rights, and, as part of

⁹⁵ Theme Committee 4: Fundamental Rights, *Explanatory Memoranda* (n 88) 272–73. See also Panel of Constitutional Experts, *Memorandum to Chairpersons and Executive Director of the Constitutional Assembly re: Horizontality*, 20 February 1996.

⁹⁶ Theme Committee 4, *Explanatory Memoranda* (n 88) 270–71.

⁹⁷ *ibid.* The Theme Committee cited the judgment of *Magano v District Magistrate, Johannesburg* 1994 (4) SA 172 (W) at 176G.

⁹⁸ Theme Committee 4, *Explanatory Memoranda* (n 88) 270.

⁹⁹ *ibid* 773–74.

¹⁰⁰ *ibid* 737.

the process of framing and formulating constitutional rights, discussed whether each individual right should apply to private individuals or entities.¹⁰¹ Once broad agreement was reached on the type of rights to be entrenched, each political party was requested to provide preliminary submissions on what they understood the underlying justification and scope of the right to be. From there, they were further required to answer two questions (i) should the right apply to common law/customary indigenous law and (ii) should it apply to a person or entity other than the state. Though parties offered varying interpretations, the Theme Committee noted in their final report that the new strategy significantly reduced disagreement.¹⁰² It appears that once the parties outlined their preferred interpretations of a constitutional right, they would be able to convince the courts on the appropriateness or otherwise of applying a constitutional right to private actors, given the underlying rationale of the right. In truth, the submissions suggest that there was considerably more agreement than divergence amongst the negotiating parties.¹⁰³

Fourth, the ANC offered a clearer vision of horizontality, which received the support of other political parties. Stemming from their belief that crystallised towards the end of the interim Constitution negotiations, the ANC informed the Constitutional Assembly at the outset of the negotiations that they intended for legislation to serve as the primary mechanism through which rights apply to private law and conduct. The ANC's characterisation of this issue is telling: the party framed horizontality as a positive state duty. The party argued that the interim Constitution had prioritised the protection of civil and political rights, and, although these negative freedoms are vital in a constitutional democracy, they are nevertheless insufficient for a South African context. The final Constitution would have to make—

the chapter on fundamental rights applicable horizontally where appropriate and [enshrine] appropriate socioeconomic rights. A balance needs to be established between equality and freedom. [...] In short the balance which the interim [C]onstitution establishes leans in favour of liberty rather than equality. The Bill should apply to human beings. [And rights must be drafted in way that gives] expression to a balance between democratic Government and the protection of individual liberty. It may be that some of the rights in the Interim Constitution were drafted without a proper

¹⁰¹ Theme Committee 4: Fundamental Rights, *Final Interim Report*, December 1995, at 2.

¹⁰² *ibid.*

¹⁰³ See Theme Committee 4, *Explanatory Memoranda* (n 88) 269.

perspective of the challenges of governance and thus do not reflect the appropriate balance between the role of the courts and the role of Parliament.¹⁰⁴

The quoted passage pits equality against liberty, and the protection of liberty is viewed as the prerogative of courts and the realisation of equality as the responsibility of a democratic legislature. The ANC placed horizontality into the same group as socio-economic rights and other sorts of affirmative obligations. The ANC proceeded to note that these affirmative obligations meant that ‘[n]ot all rights can be appropriately set out in the Constitution and they may require proper elaboration in legislation’.¹⁰⁵ This neatly sums up the view of the ANC. They advocated horizontality as a way to protect the law-making authority of Parliament to enact legislation aimed at preventing private discrimination and remedying unjust structural inequality. Of course, splitting liberty and equality as described above is both incorrect and unworkable, and no court has ever followed such a strong distinction. But the general perception of the ANC is understandable. The most predominant view of human rights is that it preserves the status quo by limiting state action. Legislation, on the other hand, is about changing things. The pro-legislation position attracted little-to-no contest, as no political party could earnestly argue against providing Parliament the authority to enact legislation.

8 Rights legislation in the final Constitution

In the beginning of 1996, although considerable agreement existed between parties, horizontality remained an unresolved issue. Members of the negotiating forum worried that the application clause was still phrased in extremely wide terms.¹⁰⁶ To recall, the provision read that the ‘Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all other organs of state and, where applicable, binds all natural and juristic person’.¹⁰⁷ One cannot but conclude that the main reason as to why horizontality continued to cause uneasiness amongst the drafters was because the text of the draft Constitution did not reflect the growing consensus amongst the political parties. That is, the legislature would serve as the principal institution for law-reform, and, if

¹⁰⁴ African National Congress, *Building a United Nation: ANC Policy Proposals for the Final Constitution*, date unknown, Part 2: Bill of Human Rights.

¹⁰⁵ *ibid.*

¹⁰⁶ Constitutional Assembly, *Refined Working Draft (Third Edition), Outstanding Matters*, 30 January 1996.

¹⁰⁷ Theme Committee 4: Fundamental Rights, *Draft Bill of Rights – Working Draft*, 9 November 1995.

necessary, the residual role for the courts would be exercised through extending common law remedies.

The Panel of Constitutional Experts, which was the highest non-political advisory body within the drafting process, once more tried to calm fears over what some believed would lead to the unbridled application of rights to private law. The Experts repeated the earlier position of the advisory team that horizontality is not a ‘day and night’ option.¹⁰⁸ Horizontality must be viewed in degrees. The Experts also informed the negotiating parties that no Constitution has ever constitutionalised private law in totality and that certain rights would inevitably be more applicable.¹⁰⁹ The other extreme was also true. Judges in a constitutional democracy would always look to the supreme law for inspiration on how to apply subordinate laws. As such, some degree of horizontality will ensue even if the text did not expressly regulate the impact of the Constitution on private law. Given that horizontal application operates along a continuum coupled with the fact that the drafters could not anticipate future disputes, the Panel of Constitutional Experts advised the negotiating parties to incorporate a degree of flexibility in the horizontal application clause.¹¹⁰

Despite advocating for some flexibility, the Experts nevertheless advised the parties to clarify what they precisely intended to achieve with horizontality, and, once this was done, to reconsider the wording of the application clause. The Experts warned that the phrase ‘applies... where applicable’ was both clumsy and invites an endless number of interpretations.¹¹¹ The phrase could either mean that it only finds application when rights expressly burden private individuals and entities or it could refer more generally to the nature of rights. Both were problematic. The former was too narrow, and would not give effect to the broader purpose of controlling acts of private power. The latter would inevitably result in rights clashing, which, the Experts predicted, would require future laws, and not the Constitution, to solve conflicting rights.¹¹²

As the negotiating process came to an end, the drafters pushed towards creating a more structured framework in order to prevent unintended consequences. The principal

¹⁰⁸ Panel of Constitutional Experts, *Memorandum* (n 95).

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² *ibid.*

task was to affirm the primacy of legislation, which is best evidenced in the way the drafters formulated the only two constitutional rights that expressly impose obligations upon private individuals and entities, namely access to information and equality.

8.1 *Access to information*

The first draft enshrined the right to access information held by the state. But it was further proposed that the right should extend to include ‘any information that is held by another person and that is required for the exercise or protection of any rights’.¹¹³ The significance of this moment must be emphasised. It was the first time a working document sought to impose an expressly worded obligation upon a private actor.

The Technical Committee was however concerned that the enforcement of the right would overwhelm the state bureaucracy and swamp the courts. The Committee therefore advised the Constitutional Committee Sub-committee to consider the promulgation of national legislation to regulate access to information, which would administer the provision of information through a series of procedures and guidelines.¹¹⁴ The proposal was inspired by the ‘Information Acts’ in the United States, Canada, Australia, and New Zealand. These statutory schemes provide an array of interwoven procedures to facilitate the process of gaining information as well as prescribing the grounds upon which information could be denied (e.g. information that would jeopardise national security and international relationships). The need to regulate the constitutional right through legislation was primarily to regulate information held by the state, but the Technical Committee also anticipated an additional benefit. Legislation could assist in regulating private obligations, as there was also a need to afford an appropriate degree of protection to privately held information like the need to protect personal privacy and confidential commercial information.¹¹⁵

The negotiating parties accepted the wisdom of the Technical Committee. The next working draft incorporated the phrase that the right to access information ‘must be

¹¹³ Theme Committee 4, *Formulations* (n 86).

¹¹⁴ See Theme Committee 4, *Draft Bill of Rights – Working Draft* (n 107), alongside Technical Committee of Theme Committee 4, Fundamental Rights, *Supplementary Memo*, undated, section 31: Access to Information.

¹¹⁵ Technical Committee of Theme Committee 4, *Supplementary Memo* (n 114).

regulated by national legislation’.¹¹⁶ The phrase was placed around squared brackets, however, meaning that its inclusion was provisional and subject to future debate. It was therefore national legislation that would regulate this constitutional obligation on private individuals and entities. In other words, the right to access information held by another person is not so much a right enforceable against a private individual or entity. It is primarily a right, enforceable against the state, for legislation.

The obligation upon private individuals and entities, including the legislative regulation of the right, never proved contentious. At a meeting convened at the end of March 1996 between the panel of Constitutional Experts and the Theme Committee, the negotiating parties confirmed that legislation would indeed be introduced to regulate the right to access information.¹¹⁷ The adopted provision read:

- (1) Everyone has the right of access to—
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.¹¹⁸

8.2 *The equality clause*

The second published working draft recognised an additional duty on private individuals and entities. The equality clause extended the duty upon the state not to discriminate to also cover private individuals and entities. The clause provided that ‘[n]either the state nor any person may [unfairly] discriminate directly or indirectly against anyone on one or

¹¹⁶ Theme Committee 4, Fundamental Rights, *Draft Bill of Rights – Working Draft*, 22 November 1995. The phrase was inserted in square brackets, indicating that it was subject to further negotiation.

¹¹⁷ Panel of Constitutional Experts and Technical Committee 4, *Memorandum to Chairpersons and Executive Director of the Constitutional Assembly re: Access to Information (s31) and Just Administrative Action (s32)*, 29 March 1996. The recommendation was based on the proposal by the Constitutional Committee Sub-committee of the Constitutional Assembly, *Minutes of the Meeting*, 18 March 1996, item 2.25–2.26.

¹¹⁸ See Constitution, schedule 6, item 23(1). The transitional arrangements afforded the state three years to enact the legislation required by sections 9 and 32. The transitional arrangement further provided that the right to access information held by another person is not enforceable until the envisaged legislation is enacted.

more' of the listed grounds.¹¹⁹ The inclusion of this private obligation was not contentious, since, at the beginning of the negotiations for the final Constitution, it was agreed by all political parties that the right not to be discriminated against would find horizontal application.¹²⁰

The private duty provoked no major debate until the first week of March 1996. The Constitutional Committee Sub-committee resolved that the horizontal application portion of the equality clause required more structure.¹²¹ Given that the ANC viewed legislation as the primary means for horizontal application, the parties agreed that the equality clause should contain an express obligation upon the state to promulgate legislation aimed at combating discrimination in the private sphere. The negotiating parties split on the next step. The NP and DP now viewed the obligation as only falling upon the state. That is, the state is under an obligation to prohibit discrimination in the private sphere through the promulgation of national legislation. For these parties, it was no longer necessary to directly and expressly impose an obligation upon private individuals and entities. These parties therefore requested that 'nor any person' be deleted. The ANC resisted the request. Though national legislation would serve as the mechanism through which private acts of discrimination would be outlawed, the ANC was resolute in their belief that the combination of national legislation and an express constitutional duty upon private individuals and entities was necessary to curb discrimination and reinforce the idea that the obligation is both vertical and horizontal in effect.¹²²

The fourth working draft, published in the third week of March, partially reflected this consensus.¹²³ The equality clause made reference to national legislation, but it did not impose an obligation upon the state. The drafters merely moved the provision in the limitation clauses that provided 'the provisions of the Bill of Rights do not prevent the state from adopting any legislative or other measures designed to prevent or prohibit [unfair] discrimination' into the equality clause.

¹¹⁹ Constitutional Assembly, Consolidated Draft, 19 October 1995, s 4(3). The word 'unfairly' was encased in square brackets, which meant that its inclusion was subject to further debate. 'Unfairly' was included in the final text.

¹²⁰ Theme Committee 4, *Explanatory Memoranda* (n 88) 269.

¹²¹ Constitutional Committee Sub-committee, *Minutes of the Meeting*, 5 March 1996, item 2.3.

¹²² *ibid.*

¹²³ Constitutional Assembly, *Working Draft, Fourth Edition*, 20 March 1996.

At a meeting convened at the end of March 1996 between the panel of Constitutional Experts and the Theme Committee, it was noted that although there was no significant dispute regarding the application clause, there was still one final matter outstanding. The political parties had yet to make a decision on an earlier report of the Joint Panel (Independent Panel of Constitutional Experts and Technical Committee) recommending that a provision be inserted into the application clause that would require the courts to build up common law remedies whenever rights find horizontal application.¹²⁴ This was the intention of the parties, and the recommendation was accordingly accepted.¹²⁵ The first published Bill, tabled on 22 April, provided that ‘[w]hen a right in the Bill of Rights binds a natural or juristic person, and there is no law of general application that grants a remedy based on the right, a court must develop the common law to grant a remedy based on that right.’¹²⁶ This was the first time the text of the constitutional draft reflected the long-held expectations of the drafters. Legislation would serve as the primary means through which private constitutional duties would be given effect. The courts would assume a residual role, and their law-making powers would be exercised through the development of the common law.

The equality clause was also reformulated to reflect the change in the application clause. On the clearer understanding that the courts would enjoy the residual power to develop the common law whenever legislation did not provide a remedy, the drafters converted the legislature’s permission to enact antidiscrimination into a mandatory duty to act. The provision read in part:

No person may be unfairly discriminate directly or indirectly against anyone on one or more grounds [...]. The state must adopt national legislation to prevent or prohibit discrimination. In applying [the right], courts may develop the common law only to the extent that the required legislation does not provide a remedy based on this right.¹²⁷

On 29 April, Technical Committee 4 proposed a reformulation of the horizontal application clause. The Committee recommended that the phrase ‘a remedy based on the

¹²⁴ Panel of Constitutional Experts and Technical Committee 4, *Memorandum* (n 117). The fifth edition of the Refined Working Draft noted within a footnote that the current formulation of subsection (2) of the application would depend on the solution of the equality and limitation issues. See Constitutional Assembly, Constitutional Committee, *5th Edition Refined Working Draft*, 15 April 1996.

¹²⁵ Constitutional Committee, *Minutes of the Thirty Eighth (38th) Meeting of the Constitutional Committee*, 18–19 April 1996, item 4.2.

¹²⁶ Constitution of the Republic of South Africa Bill, 22 April 1996 [BA34-96] s 8.

¹²⁷ *ibid* s 9.

right’ should be replaced with ‘a remedy giving effect to the right’. The preference for the latter was to amplify the intention of the drafters that the powers of the courts to develop the common law is only triggered once subordinate sources do not provide adequate relief (many common law rights already give effect to portions of constitutional rights, despite the fact that common law was originally not based or derived from constitutional rights).

The re-formulation [...] is also designed to ensure that the development of the common law only occurs “to the extent” that existing common law or legislation does not provide a remedy giving effect to the right. If there is existing law that gives effect to the right, an applicant must rely on this law. Common law development [...] is ousted when law of general application already exists giving effect to the constitutional right.¹²⁸

Finally, and after the ANC initially suggested its removal, the Technical Committee also concluded that the new formulation of the horizontal application dispenses with the need for the equality clause to instruct the courts to develop the common law if the state fails to enact antidiscrimination legislation in the private sector (as this instruction was now contained in the general horizontal application clause).¹²⁹ The proposal was accepted, though a portion of the language and structure was amended.¹³⁰ The adopted equality clause read in part:

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

¹²⁸ Technical Committee 4, *Suggested Re-Formulation of Section 8(3) [Application]*, 29 April 1996, item 2.

¹²⁹ *ibid* item 4.

¹³⁰ See Panel of Constitutional Experts, *Memorandum to Party Representatives Involved in Bill of Rights re: Application – Bill of Rights*, 30 April 1996.

The minutes of 1 May/2 May record that the issue of horizontality was no longer an outstanding matter. On 8 May 1996, the final version, subject to stylistic edits, was adopted.¹³¹

- (1) The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary, develop the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).¹³²

9 The missing law-making framework

This chapter debunks a common understanding. The horizontal application of constitutional rights is often viewed — and accordingly criticised or celebrated — as a means of increasing the law-making powers of the judiciary to regulate private laws with constitutional right norms. But the drafting history of the South African Constitution shows a different intention. Horizontality was introduced primarily to safeguard the law-making authority of the legislature, which required taking measures to prevent the judiciary from applying a negative/liberal interpretation to constitutional rights that would otherwise restrict economic and social legislation (which was thought necessary to remedy the wicked legacy of apartheid). The general idea being that courts would be dissuaded from invalidating legislation that limits private autonomy or property in situations where the Constitution permits the imposition of obligations upon private individuals and entities.

¹³¹ The Constitutional Assembly reconvened on 11 October 1996 to adopt an amendment version of the Constitution, which was needed as the Constitutional Court refused to certify the 8 May 1996 version on the ground that certain provisions (unrelated to horizontal application) failed to comply with the 34 constitutional principles as required by the interim Constitution.

¹³² Constitution of the Republic of South Africa Bill, 6 May 1996 [B34A-96], read with the Errata Document on 7 May 1996 which altered some wording. In section 8(2), ‘that is applicable’ is replaced with ‘that, it is applicable’, in section 8(3)(a) ‘must apply or’ is replaced with ‘must apply, or’ and in section 8(3)(a) ‘develop the common law’ is replaced with ‘develop, the common law.’ The inclusion of section 8(3)(b) is discussed in chapter 3.

The translation of this aim into the architecture of the South African resulted in a tension between the law-making institutions. While the primacy and role of the legislature is clearly demarcated and preserved, the precise scope of the judicial law-making role is not fully defined.¹³³ While section 8(3) requires the courts to develop the common law whenever legislation does not give effect to a right, there are indications that the power of the courts is not automatic as it appears on first glance. For starters, the equality clause and the access to information right demand legislation to give effect to a private obligation. Today, it seems highly improbable that the courts would override that express demand.¹³⁴ Another factor to consider is that the courts cannot always remedy the inactions of the state. Horizontality was introduced to secure the capacity of the state to implement an aggressive social reform policy. That certainly is not a task amenable to judicial determination.

That is not the only law-making tension. The drafting history shows that the focus fell on securing the law-making powers of the legislature and disarming the courts from blocking state measures that could otherwise be prohibited or limited in liberal constitutional democracies. The law-making powers of the judiciary remained at the periphery of the debate, which meant that the drafters never gave full and proper consideration to how the courts would actually exercise their residual law-making power. This missing law-making framework is elaborated on in the next chapter.

¹³³ James Fowkes, *Building the Constitution* (CUP 2016) 102.

¹³⁴ See *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 86; *My Vote Counts v Speaker of the National Assembly* 2016 (1) SA 132 (CC) para 160.

REJECTING FRAMEWORKS

This chapter rejects the three judicial law-making frameworks that were mooted during the drafting of the Constitution.

1 Three frameworks

How should courts exercise their mandate to rebuild private law in accordance with constitutional right norms? This question is answered more fully in Part B of the dissertation. But, before doing so, it may prove helpful to demonstrate why the three broad frameworks mooted during the drafting of the final Constitution are ill equipped to operate as judicial law-making frameworks. The first is the section 36 rights-limitation analysis; the second is the direct application of constitutional rights; and the third is the indirect application of constitutional values. To simplify the analysis, and where convenient, the chapter combines the second and third proposed approach under the heading ‘theoretical models’. To position the three law-making frameworks in context, the chapter begins with a summary of a conversation between judges and drafters that took place towards the end of the negotiation period for the final Constitution.

In *Du Plessis v De Klerk* — which is the only horizontal application judgment delivered by the Constitutional Court under the interim Constitution — the majority of the court rejected an invitation to apply constitutional rights directly to private law and conduct.¹ The court surmised that the direct horizontal application of rights would thrust

¹ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC).

upon the judiciary a formidable and uncertain task of law-reform. Direct application would not only usurp the law-making authority of Parliament, but it would also lead to parts of private law being invalidated that would in turn require the courts to fill in the gaps with new laws. The problem identified was that the (interim) Constitution had not provided the judiciary with a framework on how to make these laws. More specifically, there was no framework to resolve conflicting constitutional rights in private disputes.² On what basis, for example, would a court decide whether an individual's privacy right must yield to the free speech right of the media? Or, in a land eviction application, under which conditions would a court favour the housing right of an unlawful occupier over the property right of a landowner?

The section 36 rights-limitation analysis was mooted as a possible solution, presumably because the framework for reviewing legislation encapsulates a balancing exercise. That is, courts are required to evaluate whether the benefit obtained from a particular legislative measure outweighs the harm inflicted upon a constitutional right. The *Du Plessis* court rejected the invitation. The court opined that the framework would invite 'insurmountable' problems, and one of the judges further remarked that the limitation analysis was 'clearly not designed and is quite inappropriate' for resolving clashing rights in private law.³ The reasoning to support the rejection is terse. It appears that the court believed that the limitation analysis provided no further assistance on how to balance rights within private law. The common law already reconciled conflicting rights and interests through a finely-tuned system of balancing which had developed over centuries in response to a multiplicity of policy concerns.⁴ The limitation analysis – which merely required any limitation of a right to be reasonable and justifiable in open an open and democratic society based on freedom and equality — offered no better guidance on how the balancing exercise should operate in private disputes.⁵

The *Du Plessis* court settled on the indirect application model holding that the application of constitutional *values* provides a more appropriate law-making framework. The court explained that while the judiciary does not have the power to strike down private law rules (and, in turn, legislate new ones), the judiciary is nevertheless required

² *ibid* para 112.

³ *ibid* paras 55, 112 (Ackermann J).

⁴ *ibid* para 55.

⁵ (Interim) Constitution of the Republic of South Africa Act 200 of 1993, s 33(1).

to develop and apply private law rules in a manner that has due regard to those values and objects that underlie constitutional rights.⁶ In sum, indirect application promotes the incremental development of existing rules in accordance with the rhythm and internal logic of the common law. The *Du Plessis* court highlighted that this model better allows for the balancing of conflicting rights, and, because it only invites incremental change, has the added benefit of respecting the role of the legislature to serve as the principal institution for law-reform.⁷

The *Du Plessis* court's rejection of the rights-limitation analysis was notable. At the time the judgment was delivered, the text of the final Constitution had already been approved and it enjoined the judiciary to perform a task that the apex court had now labelled insurmountable and inappropriate. Section 8(2) of the Constitution authorises the direct application of rights to private individuals and entities, and, if necessary, section 8(3)(b) permits the courts to limit rights in the exercise of their law-making powers under the horizontality provisions provided that the limitation of the right complies with the section 36 limitation analysis. The limitation analysis echoes its counterpart in the interim Constitution. It provides that a constitutional right may be 'limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁸

The constitutional drafters had thus also foreshadowed the problem of a missing law-making framework, but, unlike the court, the drafters believed the rights-limitation analysis to be an appropriate framework. In the final months of negotiations, the Independent Panel of Constitutional Experts advised the negotiating parties that the horizontal application of constitutional rights would inevitably cause rights to come into conflict. If the drafters did not formulate an appropriate framework, the Experts warned that future subordinate laws, and not the Constitution, would be required to solve conflicts.⁹ Less than two weeks before the Constitution was finalised, the Technical

⁶ *Du Plessis* (n 1) para 60.

⁷ *ibid* para 53.

⁸ Constitution s 36(1) continues to provide a list of non-exhaustive factors the courts must take into account. These are (i) the nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) less restrictive means to achieve the purpose.

⁹ Independent Panel of Constitutional Experts, *Memorandum to Chairpersons and Executive Director of the Constitutional Assembly re: Horizontality*, 20 February 1996.

Committee proposed a solution. In the exercise of their law-making powers under the horizontal application clause, the courts were permitted to develop the law in a way that limits constitutional rights, provided such limitation is in accordance with the rights-limitation analysis.¹⁰ That proposal was accepted and enshrined in section 8(3)(b) of the Constitution.

The *Du Plessis* court's preference for indirect application over direct application also stood in contrast to the approach of the constitutional drafters. At the time of drafting the interim South African Constitution, there was a belief that there was a law-making difference between these two theoretical models. This all changed when drafting the final Constitution. The legal team cautioned the negotiating parties not to place any import on academic distinctions between the so-called 'direct' and 'indirect' models of horizontal application. The advisors explained that these concepts aim to describe different views on the 'point of entry', but they do 'not necessarily affect the impact and extent of application.'¹¹ In other words, they have no appreciable bearing on the law-making mandate and powers of the courts. It was partly on this advice that the negotiating parties settled on provisions that incorporated elements of both direct (section 8(2)) and indirect (section 39(2)) application.

The purpose of this chapter is twofold. First, it provides support to the initial view of the *Du Plessis* court that the rights-limitation analysis cannot be used as a judicial law-making framework. Second, it supports the view of the constitutional drafters that neither the direct nor the indirect models of horizontal application operate as suitable law-making frameworks.

¹⁰ Constitutional Committee of the Constitutional Assembly, *Minutes of the Thirty Eighth (38th) Meeting of the Constitutional Committee*, 18–19 April 1996, item 4.2. The formulation adapted a recommendation in Technical Committee 4, *Suggested Re-Formulation of Section 8(3) [Application]*, 29 April 1996, item 2. The Technical Committee proposed that the application clause should instruct the courts when granting a remedy under the horizontal applications provisions not to 'override the effects of a limitation that meets the requirements' of the general limitation clause and 'may develop rules that limit the right, provided that the limitation is in accordance with' the limitation analysis.

¹¹ Constitutional Assembly, Constitutional Committee Sub-committee (Theme Committee 4, Fundamental Rights), *Draft Bill of Rights – Volume One, Explanatory Memoranda*, 9 October 1995, 271.

2 Rejecting the section 36 rights-limitation analysis

In the *Certification Judgment*, objectors argued that the application of constitutional rights to the legal relationships of private individuals is not a proper judicial function, and therefore should not be permitted, because the adjudicative process that accompanies horizontal application inevitably requires courts to balance rights. The concern, it seems, was that courts do not have the expertise or necessary legal framework to evaluate competing constitutional rights and other private interests outside of a legislative scheme. The court disagreed, and held that the objection—

fails to recognise that even where a bill of rights binds only organs of state, courts are often required to balance competing rights. For example, in a case concerning a challenge to legislation regulating the publication and distribution of sexually explicit material, the court may have to balance freedom of speech with the rights of dignity and equality. It cannot be gainsaid that this is a difficult task, but it is one fully within the competence of courts [...]. That the task may also have to be performed in circumstances where the bearer of the obligation is a private individual does not give rise to a conflict with the [Constitutional Principles].¹²

Although the logic of the court may seem acceptable at first glance, there is need for some scepticism on closer inspection. A charitable interpretation of the objectors' argument is not that the balancing technique is an inappropriate means to resolve conflicting rights. The argument is rather that the process of balancing in the context of a legislative scheme is distinctive, in that its structure and function is different, from the balancing of rights in the context of the horizontal application of rights. If this is indeed their concern, the objectors' argument may have merit, and deserve a fuller explanation of how courts are expected to perform the balancing of constitutional rights in private litigation.

This viewpoint is not uncommon. In a leading case before the Supreme Court of Israel, Justice Aharon Barak wrote that courts cannot merely copy the limitation analysis used to test state action and paste it into private litigation. He noted that a 'change takes place' when constitutional obligations are transferred from the realm of public law into

¹² *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 55. For an overview of the constitutional principles in the interim Constitution, see chap 2, notes 47, 131.

that of private law.¹³ Not only are the obligations of private individuals different from that of the state, the balancing of rights in vertical applications operates under assumptions and conditions that may be different in private law disputes. In his subsequent academic writings, the Judge President argues that alongside the limitation analysis applicable to state action, courts should establish frameworks for balancing conflicting constitutional rights in disputes between private parties.¹⁴ The Canadian Supreme Court has similarly concluded that a different sort of balancing exercise must take place if the state is not a litigating party.¹⁵ Though the Canadian Supreme Court appears not to have provided much elaboration on this point, the court has nevertheless suggested that the act of balancing constitutional values in private litigation must assume a more flexible framework compared with the limitation analysis performed in cases litigated against government.¹⁶

The differences between balancing in the context of state action and horizontal application disputes must be underscored. When state action is reviewed, the judicial balancing exercise forms part of the broader proportionality analysis. The doctrine of proportionality developed over time and across national borders as a means to facilitate a core objective of constitutional law: namely, to control the exercise of state power. To this end, the proportionality analysis is a reconstructed decision-making process that aims to situate the courts in the position of government.¹⁷ The process does not allow the courts to choose between competing policies. That decision is left to the elected branches of government. The proportionality analysis is designed to provide the courts with a structured method of gathering and evaluating the evidence on which the policy is built in order to facilitate an enquiry into whether or not the implementation of a chosen government policy as translated into law is a permissible exercise of state power.

The proportionality analysis typically commences with rationality, which enquires into whether the measure taken by the state has a rational connection to a

¹³ *Jerusalem Community Jewish Burial Society v Kestenbaum* [1992] 46(2) PD 464, at 531, translation taken from Aharon Barak, 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (2001 Hart) 13, 36.

¹⁴ Barak, 'Human Rights and Non-State Actors' (n 13).

¹⁵ *Hill v Church of Scientology* (1995) 2 SCR 1130 (SCC) para 97.

¹⁶ *ibid.*

¹⁷ Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 111.

legitimate government purpose.¹⁸ The rationality test is derived from two central tenets of our constitutional law. First, the idea that a legislature must act rationally stems from the rule of law, which, as a starting point, requires the exercise of any public power to be authorised in law. The rule of law further obliges the state to follow the correct procedures when creating new rules.¹⁹ The promulgation of valid legislation is therefore dependent on debate within Parliament following the receipt of public comments.²⁰ The Constitution simply cannot condone even the most benevolent of government acts when constitutionally prescribed law-making processes are disregarded.²¹ In addition to these procedural thresholds, the rule of law also prevents the legislature from exercising their law-making authority in an arbitrary or capricious manner.²² Second, the legislative scheme must be able to achieve a public good. Legislative law-making powers must therefore be exercised in a manner that realises the purpose for which it is bestowed, namely to ‘ensure government by the people under the Constitution’.²³ While Parliament is afforded wide discretion to choose policy objectives and plans, the rationality requirement nevertheless ensures that any chosen policy and plan is able to implement a ‘defensible vision of the public good’ through coherent and integral legislation.²⁴

If the law under review satisfies the rationality component of the test, the next step investigates whether less restrictive means are available to achieve the same result. This prong of the analysis stems from the belief that constitutional rights enjoy an elevated status within the legal system, and thus aims to ensure that the implementation of a government policy does the least amount of harm. These first two prongs of the

¹⁸ Though it is presented as such for illustrative purposes, the South African Constitutional Court does not adopt a structured proportionality analysis similar to Germany and Canada. The court instead follows a ‘global proportionality analysis’. *S v Manamela* 2000 (3) SA 1 (CC) para 32:

It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list.

See note 8 above for a list of the five enumerated factors.

¹⁹ *Head of Department, Department of Education v Welkom High School* 2014 (2) SA 228 (CC) paras 85–86.

²⁰ Constitution ss 57(1), 59(1)(a), 70(1), 72(1)(a).

²¹ *Welkom High School* (n 19).

²² *New National Party v Government of the Republic* 1999 (3) SA 191 (CC) para 19.

²³ Constitution s 42(3).

²⁴ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25.

proportionality analysis are mostly objective evaluations, and, to satisfy the courts, the state is expected to tender evidence to demonstrate the basis upon which a rights-infringing decision was taken.

The last prong of the rights-limitation analysis is the balancing exercise. Judicial balancing, or, to employ the more common term, proportionality in the narrow sense, asks the court to determine whether a state-authored infringement of a constitutional right is a disproportionate limitation of one right when compared with the benefit gained in realising another right or other public interest. This is predominantly a value judgment, which is an enquiry that is less objective than the first two prongs of the proportionality analysis. Judicial balancing consequently attracts a lot of criticism. Some scholars have even argued that balancing is an inherently irrational decision-making process that leads to arbitrary and inconsistent results since the process is incapable of producing any clear and objective legal standards that can direct the weighing of competing rights and other legal interests.²⁵ Given the problems with balancing, it should come as no surprise to learn that the South African Constitutional Court rarely uses this more subjective prong of the proportionality analysis to strike down legislation, opting rather to invalidate laws on the more objective criteria of ‘less restrictive means’, ‘over-breadth’, ‘illegitimate government goal’, and ‘irrational connection’.²⁶

In pursuit of a more principled method for limiting rights at the instance of the state, constitutional law has developed certain rules, procedures, and assumptions to counteract the potential risk of arbitrariness that is associated with value judgments. One such rule is that the state bears the onus to justify the infringement of a constitutional right.²⁷ The justification for doing so stems from a principal purpose of constitutional rights. Rights protect interests that ought to be kept out of the reach of ordinary politics. If the state, exercising power over individuals, takes measures that erode these protected interests, it then seems appropriate for the state to provide an adequate justification. If they fail to discharge the obligation of showing why a particular measure is more advantageous than detrimental, then the measure will be declared unconstitutional. An additional reason for placing the onus on the state is that government entities usually

²⁵ See Grégoire Webber, *The Negotiable Constitution* (CUP 2009) 87–115; Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 *ICON* 468.

²⁶ Niels Petersen, ‘Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court’ (2014) 30 *SAJHR* 405, 425–429.

²⁷ *Ferreira v Levin* 1996 (1) SA 984 (CC) para 44.

enjoy far better access to information.²⁸ Non-state entities simply do not have the level of experience and resources needed to justify state policy.

An additional feature that contributes to the operation of the balancing exercise is that a democratically elected government must be afforded leeway to pursue objectives that it considers to be in the public interest. The advancement of the public good is the primary purpose of the state, and, as the court reminds us, it is not the role of the judiciary to ‘second-guess the wisdom of policy choices’ made by the duly elected branches of government.²⁹ The function of a court is rather that of a neutral arbiter to assess whether the creation and implementation of programmes or lack thereof complies with the commands of the Constitution. The doctrine of balancing is therefore not only concerned with measuring a *benefit:harm* ratio but also identifying the discretion that must be afforded to the original decision-maker. This leads to a well-recognised principle in constitutional law that one of the prime considerations in determining the latitude a court affords the state to implement a rights-infringing programme is the extent of the violation. As a general rule, the more intrusive the infringement on the interests of the right holder, the greater the need is for a compelling public purpose.³⁰ When the limitation is considered minor, courts tend to provide the state more scope to pursue the rights-infringing programme. It is for this reason that in those few instances where the Constitutional Court has struck down legislation on the balancing-prong of the proportionality analysis, the court emphasised the significant impact that the impugned law had upon a constitutional right, employing the standard of ‘manifest disproportion’.³¹

Law Society v Minister of Transport neatly illustrates the assumptions that underlie the proportionality analysis.³² The matter originates from major legislative alterations to the workings of the Road Accident Fund. The legislature abolished the common law right of a road accident victim to claim compensation from the wrongdoer for losses that were not covered by the Fund. The abolition of the claim was particularly striking given that the amendments also introduced limits to the type and amount of

²⁸ Stu Woolman and Henk Botha, ‘Limitations’ in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2ed, RS April 2014, Juta) 34–44.

²⁹ *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

³⁰ *S v Bhulwana* 1996 (1) SA 388 (CC) para 18; *Manamela* (n 18) para 69.

³¹ *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) para 46. See also Petersen (n 26).

³² 2011 (1) SA 400 (CC).

damages recoverable from the Fund. Prior to the legislative amendments, and subject to a few exceptions, the Fund's liability was unlimited. Victims of road accidents were entitled to claim from the Fund what they would have otherwise been entitled to claim from the wrongdoer under the law of delict. The amendment altered this approach. In the future, the Fund would only cover non-pecuniary damages for 'serious' injuries; the amount recoverable for loss of future earnings was capped; and medical costs were confined to government-prescribed tariffs. In essence, any residual damages — that is, the difference between actual loss and damages recoverable from the Fund — were to be borne by the victim.

The decision to abolish the common law right was brought under constitutional review. The court found the measure to infringe the section 12(1) right to freedom and security of the person, reasoning that the abolition of the common law right diminishes the capacity of victims to remedy violations to their bodily integrity and security of their person.³³ However, following submissions by government on its policy rationales, the court concluded that the infringement was a justifiable and reasonable limitation. The judgment does not follow a structured proportionality analysis, but the three main prongs of the analysis are detectable.

First, the court held that there was a rational connection between the legislative amendment and a legitimate government purpose. The abolition was part of a broader strategy to restructure the overall purpose and management of the Fund in order to make the system more sustainable and equitable. The Fund was insolvent, and government had no option but to take urgent measures to improve the financial health of the Fund. To this end, government presented evidence of how these cost-saving measures would assist in improving the financial viability of the Fund.³⁴ Part of the saving resulted from reduced administrative and legal costs, as the type and amount of damages recoverable from the Fund were now more fixed and easily calculable. The amendments were also part of government's strategy to change gradually the operating premise of the Fund from fault-based liability to no-fault liability. The government's primary objective was to make the Fund operate as a type of social security compensation system, which means that victims should be entitled to recover damages regardless of whether negligence can be proven.³⁵

³³ *ibid* para 75.

³⁴ *ibid* paras 41–42.

³⁵ *ibid* para 50.

The abolition of the common law claim served this rational purpose for two main reasons. First, maintaining a residual common law claim fits awkwardly with the ambition to turn the Fund into a social security system that is not dependent on wrongdoing. Second, though the abolition of the common law claim does not affect the financial viability of the Fund, the claim for residual damages would have significantly increased the financial risk of motorists. The need to provide immunity to a high-risk activity that is essential to everyday life was held to be a legitimate government goal.³⁶

Second, the court found that there were no less restrictive measures available to achieve the policy. The evidence for reaching that conclusion is not clear, but it appears derived from the court's holding that when a government aims to bring 'about reform which entails several steps and involves complex and competing policy options it must be permitted to do so in incremental measures and "be given reasonable leeway to deal with problems one step at a time"'.³⁷

Third, the court engaged in a balancing exercise, comparing the harms and benefits of the legislative scheme. The court noted that the infringement on the right is only partial as victims are still entitled to claim damages from the Fund, albeit a capped amount.³⁸ The court further concluded that the balance struck by the legislature was constitutionally acceptable: retaining the common law claim would impose a 'colossal risk' on drivers due to a 'relatively small inattentiveness or oversight'.³⁹ The court further questioned the number of individuals who would actually benefit from retaining a residual claim for damages. There are only a small number of South Africans who are in a financial position to pay damages arising from a motor accident, and the residual common law claim would effectively only be used by the few wealthy individuals who enjoy the economic means to pursue costly litigation.⁴⁰

The above discussion shows that the balancing exercise in vertical application disputes is different to that witnessed in horizontal application disputes. Most of the assumptions that underlie the proportionality analysis for testing the validity of state action are absent in litigation involving the human rights obligations of private

³⁶ *ibid.*

³⁷ *ibid* para 52, quoting *Egan v Canada* [1995] 2 SCR 513, at 573.

³⁸ *Law Society* (n 32) para 80.

³⁹ *ibid* para 50.

⁴⁰ *ibid.*

individuals and entities. Private individuals do not enjoy the power, capacity, or expertise to advance the public good.⁴¹ In fact, within a legal dispute, private parties have almost no incentive to advance public policy considerations or the general welfare of the state. The immediate goal of a private litigant is to secure his or her own personal interests against all others. In vertical application matters, on the other hand, state policy is equated to the interests of the state. In the reconstructed balancing exercise, the state is required to advance supporting evidence. In private litigation, the parties are not responsible for the creation of legal rules, and they therefore cannot be expected to offer broad justifications for the law, and, when private litigants do so, their argument takes on a strong tint of bias.⁴² Herein lies the important distinction between the vertical and horizontal application. The legislature infringes upon constitutional rights in order to advance government policy, which is what the section 36 rights limitation analysis is designed to review. In horizontal application matters, in contrast, the courts are not reviewing state policy. Nor do courts choose policy grounds to champion, and, thereafter, test the validity of those policy grounds against constitutional rights.

In sum, though the balancing exercise in vertical and horizontal cases share similarities, theory on the horizontal application of rights cannot cut-and-paste the proportionality doctrine into its framework. To be clear, this chapter does not argue that the courts should not adhere to the prescripts of section 8(3)(b) of the Constitution. The common law is a law of general application, and any limitation it introduces must comply with section 36. The section 36 limitation analysis can therefore be of guidance, but on its own the rights-limitation analysis cannot produce law. The judicial law-making framework must develop its own set of rules and principles that direct the balancing of conflicting rights in private disputes.

⁴¹ See *Daniels v Scribante* 2017 (4) SA 341 (CC) para 40 (the state must promote the interests of society as a whole which it must do through the raising of public funds; private individuals and entities have neither these objectives nor these powers, and so constitutional obligations upon private individuals and entities will differ from that of the state).

⁴² Lorraine Weinrib and Ernest Weinrib, 'Constitutional Values and Private Law in Canada' in Daniel Friedman and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart 2001) 43, 55–56.

3 Rejecting the theoretical models

Following the lead of other jurisdictions from around the globe, South African legal commentary has proceeded on the assumption that there is a difference of practical significance between two theoretical models through which constitutional rights burden, or at least have an effect on the legal obligations of, private individuals and entities.⁴³ The central difference between the two models is built on a distinction between the (direct) application of constitutional *rights* and the (indirect) application of constitutional *values*.⁴⁴ However, despite starting at different points, the models eventually funnel towards the same dilemma without providing a solution. That is, none of the models actually provide a law-making framework on how to resolve conflicting rights. Figure 4 maps the discussion ahead.

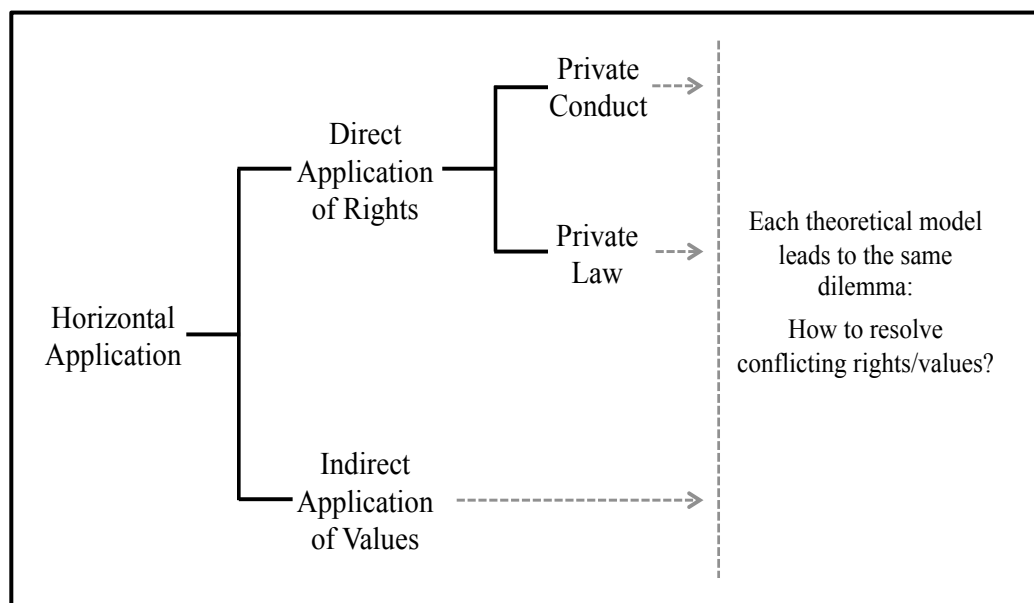


Figure 4: Theoretical models of direct and indirect horizontal application

⁴³ See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 186; *Du Plessis* (n 1) para 122; Frank Michelman, 'On the Use of Interpretive Charity' (2008) 1 *Constitutional Court Review* 1, 40.

⁴⁴ Part of the trouble with applying the theoretical models is that there is no universally accepted criterion for distinguishing between direct and indirect application. The law journals record a multiplicity of variable and clashing accounts. An alternative method to distinguish between direct and indirect application is to focus on whether constitutional rights apply to either private conduct or private law. For an extensive typology of horizontality (under English law), see Alison Young, 'Mapping Horizontality' in David Hoffman, *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 16. See also the various approaches in Dawn Oliver and Jörg Fedtke, 'Comparative Analysis' in *Human Rights and the Private Sphere* (Routledge-Cavendish 2008) 467.

3.1 *Direct application*

Direct application entails rights-based adjudication, and the literature identifies two possible ways in which this can occur. The first sort is the application of rights to the *conduct* of private individuals and entities. That is, the constitutional right is interpreted to impose an obligation upon a private individual or entity to either refrain from or perform a particular action. The constitutional right therefore creates a right-duty relationship between two non-state entities which is immediately enforceable. The right to privacy can illustrate this method. One of the core rationales of the privacy right is to afford each person control over the type of personal information that enters the public domain. A conceivable interpretation of the privacy right could therefore demand that any private individual or entity that enjoys access to another's personal information should be imposed with a correlative duty not to disclose.⁴⁵ For example, a priest could rely solely on the constitutional right to privacy to prohibit a news organisation from publishing a story detailing his homosexual affairs. In sum, the direct application of constitutional rights to private conduct means that rights create independent causes of actions which a litigant may plead without relying on any other source of law.

Courts rarely adopt this sort of direct application.⁴⁶ Their reluctance is best explained through the core objection raised against the horizontal application of rights.⁴⁷ Constitutional rights are traditionally conceived as a set of negative liberties, and their core purpose is to safeguard individual freedoms against the otherwise coercive will of the state.⁴⁸ Imposing obligations upon private individuals and entities threatens this

⁴⁵ *NM v Smith* 2007 (5) SA 250 (CC) paras 132, 136.

⁴⁶ A handful of judgments adjudicated under the interim Constitution suggested that certain constitutional rights could possibly impose direct obligations on private individuals and entities. See *Holomisa v Argus Newspapers* 1996 (2) SA 588 (W) at 596G–597C; *Gardener v Whitaker* 1995 (2) SA 672 (E) at 648H–I; *Mandela v Falati* 1995 (1) SA 251 (W) at 257H–J.

⁴⁷ For a summary of the core objections against horizontality, see Oliver Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 *European Law Journal* 766, 769. The author cites that the application of constitutional rights to private law (i) threatens the core of private law, namely a libertarian view of autonomy and (ii) permits the judiciary usurp the power of the legislature to regulate private relations.

⁴⁸ The normative objection against horizontality is traceable to natural right theories developed more than three centuries ago. The work of John Locke proved amongst the most influential. Locke believed that all individuals are born with a set of innate and inalienable rights. However, and to ensure an orderly society in which these rights are secure, individuals were better off submitting to the controls of a governing structure. Individuals therefore entered into the so-called social contract. Governments only gained the authority to exercise public power over individuals for as long as they did not exercise their powers in a manner that encroached upon the innate rights of individuals. Locke's thinking reverberated in the works of many other theorists, which, over time, would come to establish but also limit the legal enforcement of human rights. Natural rights

classical liberal reading of rights.⁴⁹ Instead of protecting individual autonomy against any external interference, rights may come to limit the freedoms they profess to safeguard.⁵⁰ Consider the privacy right example from above. The duty not to disclose private information would effectively impose restrictions on the news organisation's right to free speech. The potential clash of freedoms manifests into a practical concern. A plaintiff who pleads a constitutional right as the sole cause of action would likely be met with the defendant raising a competing constitutional right. The news organisation would cite their right to free speech, which, in our hypothetical case, protects their interest in exposing the priest who had preached anti-gay sentiments. The practical objection is therefore a law-making problem. The direct application of rights to conduct would leave the courts with unwieldy *right v right* clashes and no obvious mechanism on how to adjudicate competing claims.⁵¹

The second sort of direct application seeks to alleviate the core objection. Here, constitutional rights apply to the *law* that regulates private relationships. This type of direct application is often viewed as a more palatable approach because it operates in a manner that is similar to the traditional judicial review of legislation. The direct application to law model is premised on the notion that the validity of any private law is dependent on its consistency with constitutional rights, and any rule of private law found inconsistent with a constitutional right is liable to be declared unenforceable. The argument that private law must meet constitutional standards is boosted by the understanding that the machinery of the state is always required to enforce law, and it should make no difference that the legislature never passed the impugned law. To put it another way, private law is seen as the creation of the state, and, like all other laws, the process and outcome of law-making is subject to the control of the Constitution. The

theories limit the application of human rights two ways. First, human rights are only a set of negative freedoms. They only protect freedom from interference, and do not demand the provision of any good or service. Second, the focus on the social contract between state and individual means these negative freedoms were only enforceable against the state. This thinking instilled a strong distinction between public and private life (and law). These two features still command a stronghold over our understanding of human rights, which stunts the development of extending human rights obligations to private individuals and entities. See Danwood Mzikenga Chirwa, 'In Search of Philosophical Justification and Suitable Models for the Horizontal Application of Human Rights' (2008) 8 *African Human Rights Law Journal* 294, 296.

⁴⁹ See Gavin Anderson, 'Rights and the Art of Boundary Maintenance' (1997) 60 *MLR* 120, 122–23.

⁵⁰ *Du Plessis* (n 1) para 99.

⁵¹ *ibid* paras 55, 97. See Chris Sprigman and Michael Osborne, 'Du Plessis is Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' (1999) 15 *SAJHR* 25, 43 (the direct application of rights will require balancing, which is a policy choice that must be left to the legislature).

direct application to law ostensibly mitigates the core objection because the focus shifts away from the actions of private individuals and entities onto the law-making process. To the extent that private law does not comply with a constitutional right, a litigant must appeal to the courts to adjust those private laws that fail to meet constitutional standards. For instance, the right to equal treatment may strike down private common law rules that enable testators to discriminate on the basis of race or gender.⁵² The defining characteristic of this model bears repeating. The litigation between private litigants is not grounded in constitutional rights, and private individuals and entities are not classified as duty-bound constitutional actors. The cause of action and defence remain sourced within the subordinate private law, which must comply with the Constitution.

The direct application to law model fails to mitigate the core objection, however. The effect of this sort of application will invariably lead to a result that diminishes private autonomy. If the *law* that regulates private relationships must comply with constitutional rights, then, by extension, the *conduct* of private individuals and entities as permitted by private law must also comply with constitutional rights. In the previous scenario, the testator was technically not burdened with a direct constitutional obligation not to discriminate. The testator's freedom to dispose of his property was nevertheless curtailed because the freedom conferring rules of private law were subject to constitutional control.

This sort of direct application also does not necessarily ameliorate the practical manifestation of the core objection. The abrogation of a rule of private law may create a gap in the law, which, in turn, will require the courts to remedy the now-deficient part of private law. The act of developing private law can of course take a variety of forms, which include modifying existing rules or inserting whole new causes of action and defences into private law. Even outside constitutional law adjudication, the traditional judicial development of private law carries risk. Courts have historically shown an unwillingness to alter the law, given the process is fraught with so many uncertainties.⁵³ The discriminatory testament can illustrate this point. In South Africa, the freedom to testate is not an expressly conferred right. It rather derives from the large cluster of freedoms that flow from the right to property, which includes the freedom of owners to dispose of their possessions in the manner they best deem fit. The concern is therefore

⁵² *Curators Ad Litem to Certain Potential Beneficiaries of Emma Smith Educational Fund v The University of KwaZulu-Natal* 2010 (6) SA 518 (SCA) para 42; *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) para 97.

⁵³ *Du Plessis* (n 1) paras 53, 58–59.

that a constitutional challenge to the freedom of testation would mean challenging the broader right to property. While this concern may be exaggerated, there is some evidence to support the view that some of the rules and freedoms contained in private law cannot be easily deleted. There are a handful of cases where the courts, after declaring certain rules of succession invalid for permitting discriminatory testaments, have had to perform extensive rewiring on large parts of the laws. This was necessary because those impugned succession laws were so intertwined in many principles and rules of private law that made a simple deletion impossible.⁵⁴ In addition to all of the usual problems and objections that arise when courts assume a law-making function, the output must also pass constitutional muster. That is, courts will have to find a way to strike an appropriate balance between conflicting rights (e.g. freedom of testation/property v freedom against discrimination). The application to law model remains silent on this law-making process.

The law-making power of the judiciary introduces an additional objection. A defining feature of any horizontal application dispute is a request to the courts to rewrite laws without any legislative input. In a constitutional system premised on the separation of powers, horizontality threatens to usurp the primary responsibility and power of the legislature to serve as the main institution for law reform.⁵⁵ The application of rights to private law increases the authority of the courts to regulate private law, which, over time, may curtail the capacity of the legislature to strike their own balance between interests.⁵⁶ It bears repeating the discussion in chapter one that explains why the legislature serves as the primary institution responsible for law-reform. The legislative law-making process benefits from policy research, political oversight and monitoring of implementation, the allocation of public funds to support new programmes, the involvement of the public in decision-making, the political compromise between sensitive interests, and the ability to easily revise laws to correct unanticipated consequences.⁵⁷ These benefits are either absent or significantly limited in any comparable judicial law-making process.

⁵⁴ *Bhe* (n 52) paras 101–36.

⁵⁵ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 36; *Mighty Solutions v Engen* 2016 (1) SA 621 (CC) para 39.

⁵⁶ See Chris Sprigman and Michael Osborne (n 51) 46–50.

⁵⁷ *Du Plessis* (n 1) para 80.

3.2 *Indirect application*

Indirect application is the middle ground between direct application and no application. The model grew in popularity around the globe as a means to address the objections levied against direct application. In contrast to using rights as a means to impose limits on either private conduct or law, indirect application entails the use of constitutional values as a tool to interpret and develop the common law from within. The courts typically implement this model of horizontal application by infusing constitutional values into the open-textured and value-laden concepts found within private law. For example, in the law of contract, the courts employ the notion of ‘public policy’ to deny the enforcement of an egregious contractual agreement. In the law of delict, the concept of the ‘legal convictions of the community’ is the primary tool through which civil liability for damaging private conduct is either extended or restricted. The indirect application model asks that these concepts be viewed through a constitutional prism. Ostensibly, this model allows private law to develop gradually in line with the values underlying the Constitution, resulting in minimal disruption and uncertainty. However, whether the application of constitutional values meets the objections raised against horizontality is debatable. Constitutional values are intangible tools, making legal reasoning difficult. Not only is the legal source from where they originate unclear, but values are also without a clear duty-bearer. Even if these problems are set aside for the moment, the development of the law still requires the courts to resolve any constitutional values that may come under conditions of conflict. In the law of contract, for example, the value of autonomy will clash with the value of equality and the courts must decide how best to reformulate private law rules to protect both interests. Indirect application also does not offer a workable framework on how to solve clashing rights. In fact, given that the courts are stuck with the exact same law-making problem that direct application causes, there is no guarantee that the indirect application of values will lead to a result that is both incremental and deferential to the law-making function of the legislature.

The prophecy of the legal advisors proved correct. The theoretical models are inappropriate for a South African context. They are poor predictors of future outcomes, which is mostly due to the fact that each of the models fails to adequately address the concerns they profess to solve. Constitutionally protected freedoms are inevitably limited, while the courts are faced not only with the dilemma of resolving competing interests but also with criticisms that they have usurped legislative law-making authority. All of the models eventually funnel to the same problem. The next chapter — which

performs an analysis on the constitutional text and some of the seminal decisions on each of these theoretically distinct pathways — reinforces this conclusion. They do indeed lead to a similar result. This is because each pathway requires the courts to readjust private law rules and principles, and, given that the same judicial skillset is used to solve rights in conflict, a similar balancing process and outcome ensues regardless of the different starting points.

Given that none of the law-making frameworks mooted during the drafting of the South African Constitution are fully workable, the courts would have to develop their own framework. This is discussed in Part B.

PART B

JUDICIAL LAW-MAKING

THE BALANCING PROCESS

This chapter introduces the ‘balancing process’, which is the main framework used by the Constitutional Court to resolve conflicting constitutional right norms in horizontal application disputes.

1 Balancing as the law-making process

A South African Constitutional Court judge recently remarked that the debate over horizontality is ‘to some extent’ about the balancing exercise.¹ This chapter strengthens that hypothesis: judicial balancing is what the debate is all about. If all constitutional right norms are assigned equal normative force and each of their scopes is interpreted broadly — which certainly is the case in South Africa — then it is inevitable that right norms will eventually clash and compete against one another.² And, to resolve conflicts, courts must develop and apply some sort of framework that guides the evaluation and weighing of competing interests so as to determine the conditions under which one right norm may be limited to secure another. A comparative survey supports this strengthened hypothesis. Virtually all of the leading jurisdictions on the horizontal application of rights have applied balancing frameworks to adjudicate conflicting right norms.³ The

¹ *De Lange v Presiding Bishop of the Methodist Church* 2016 (2) SA 1 (CC) para 77 (van der Westhuizen J).

² Jeremy Waldron, *Liberal Rights* (CUP 1993) 203–10. See chap 5, sec 1.

³ Stephen Gardbaum, ‘Positive and Horizontal Rights’ in Vicki Jackson and Mark Tushnet (eds), *Proportionality* (CUP 2017) 219, 239–40. The author notes that the seminal decisions of *Lüth* and *Jerusalem Community Jewish Burial Society* failed to apply the formulaic proportionality analysis, and rather reduced the decision-making process to one of balancing the conflicting rights (or values) within each case. See also the discussion of *Mephisto* (1971) 30 BVerfGE 173 and

importance of balancing must be stressed. If it is accepted that the horizontality debate is indeed about balancing, then it follows that the judicial balancing of constitutional rights informs the law-making process through which the courts exercise their mandate and powers to rebuild private law in accordance with the Constitution.

The strengthened balancing hypothesis must be qualified, however. The worldwide attraction to the idea of balancing appears rooted within an implicit assumption that balancing promotes two core aims of any legal system. The act of balancing conjures up the image of a scale, which deceptively suggests that rights in conflict can be solved with both the certainty of a mathematical formula and the justness of a fair compromise. Whether balancing can deliver on this promise is doubtful. Though the topic of judicial balancing has received increased academic attention in recent years, there remains a dearth of robust analytical scholarship on this central component of modern constitutional law. What are the exact mechanics of the balancing exercise? Most formulations of the balancing exercise converge on the notion that the process aims to compare the benefits gained and the harms inflicted by a particular measure, but this formulation still does not tell us very much. The legal methodology including the elusive measuring standard for evaluating the *benefit:harm* ratio is all too often described in vague and abstract terms. The immense difficulty of formulating balancing structures and guidelines is perhaps best evidenced by the fact that courts have at times hedged their capacity to develop a complete theory that instructs the operation of the balancing exercise. The Constitutional Court, for instance, has cautioned that there are certain ‘problems based on contradictory values that are so intrinsic to the way our society functions that neither legislation nor the courts can “solve” them with the “correct” answers’.⁴ In these difficult cases, the court proposed, the role of a judicial officer is to ‘do as well as they can with the evidential and procedural resources at their disposal’.⁵

It is for this reason that the strengthened balancing hypothesis fails to provide much guidance on how courts exercise their law-making powers, and the hypothesis must

Deutschland-Magazin (1976) 42 BVerfGE 143 (1976) in Peter Quint, ‘Free Speech and Private Law in German Constitutional Theory’ (1989) 49 *Maryland Law Review* 247, 290–323. In these cases, the German Federal Constitutional Court held that ordinary courts must balance conflicting rights within the structures of private law, which is an exercise that must have regard to the relevant circumstances of the case.

⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 38, which quotes the minority judgment in *Abortion II* (1993) 88 BverfGE 203. For similar remarks, see *De Lange* (n 1) para 79; *Thint v National Directors of Public Prosecution* 2009 (1) SA 1 (CC) para 231; *Prince v President of the Law Society* 2002 (2) SA 794 (CC) paras 155–57.

⁵ *Port Elizabeth Municipality* (n 4).

be modified. While we may accept that balancing is the general adjudicative framework, the more important question is how exactly is the balancing exercise conducted. In sum, the debate over the judicial horizontal application rights distils to the *sort* of balancing exercise applied to resolve rights under conditions of conflict.

This chapter introduces the balancing framework adopted by the South African Constitutional Court. It does so by analysing three streams of horizontality. The first is rights-based application which is grounded in section 8 of the Constitution; the second is value-based application in accordance with section 39(2); and the third is protective state duties which stems from section 7(2). The analysis shows that these differing start points are of no appreciable difference to the eventual outcome of a dispute, as a similar type of law-making process ensues regardless of the ground upon which the dispute is pleaded. The court declines invitations to treat one constitutional right as automatically outweighing another. In other words, the court rejects fixed rules. Rather, in situations where a clash of constitutionally protected interests arises, the court adopts a form of — what will be termed — the ‘balancing process’. The defining function of the balancing process is to allow for a flexible and contextual evaluation of the specific facts and surrounding circumstances of the case at hand to determine the prevailing interest. Significantly, the balancing process is woven into private law rules and principles. The process therefore operates within the pre-existing law, which has the important benefit of adding a degree of structure and predictability to a decision-making process that may otherwise be at risk of becoming too abstract and haphazard for judicial application.

That the process for evaluating constitutional right norms is written into private law may appear to suggest that the influence of the Constitution is limited and constrained to the extent that pre-existing private law is able to accommodate the Constitution. To be clear from the outset, private law does not curb the influence of the Constitution. Or, at the very least, it should not. Such an outcome would disobey a central tenet of the South African constitutional democracy, which is that all subordinate sources of law derive their force and validity from the Constitutional Court.⁶ It is the Constitution that controls private law, and not the other way round. The Constitution imposes an external pressure on private law, and, where necessary, the courts must break and remould the private common law so as to allow constitutional norms to flow through

⁶ *Pharmaceutical Manufacturers Association 2000* (2) SA 674 (CC) para 44. See chap 5, sec 1.

it.⁷ Or, if the courts believe it unwise to rebuild the common law, the courts must locate new remedies in other subordinate sources of law.⁸ Part C of the thesis provides an example this latter option.

2 Rights-based application: section 8 of the Constitution

Section 8 of the Constitution reflects a modified version of the direct application model, and incorporates elements from both the application to law and application to conduct models. Section 8(2) reads:

A provision in the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

Although the provision authorises the application of rights to private individuals and entities, it offers little to no guidance on how to determine whether a particular constitutional provision binds a private individual or entity.⁹ While some constitutional rights expressly impose a duty upon private individuals and entities, this alone is inconclusive. Nearly every constitutional right is capable of an interpretation that extends obligations to non-state actors given that rights are formulated in an open-textured and aspirational manner. The other extreme is also a possibility. If one assumes that the core ‘nature’ or purpose of rights is only to guard individual freedoms against state interference, then no constitutional right can bind a private individual or entity.¹⁰ Whether or not a particular constitutional provision binds a private individual or entity therefore depends on how widely or narrowly the scope of the right is interpreted. In accordance with the general principles of constitutional interpretation, this process is influenced by the textual formulation of the right, the historical and normative reasons for the provision, and the political context in which the right is interpreted. More

⁷ See AJ van der Walt, ‘Legal History, Legal Culture and Transformation in a Constitutional Democracy’ (2006) 12 *Fundamina* 1, 9–10.

⁸ See *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 66 (the court must develop new remedies when the Constitution stretches the common law beyond recognition’).

⁹ See Constitutional Assembly, Constitutional Committee Subcommittee (Theme Committee 4, Fundamental Rights), *Draft Bill of Rights – Volume One, Explanatory Memoranda*, 9 October 1995, 274. The advisory legal team noted that the word ‘bind’ gives no indication as to the extent of application, and further advised that the judiciary should be given a ‘clear indication not to apply the Bill of Rights artificially to relationships to which the Bill of Rights *cannot* be applied’.

¹⁰ Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 36.

specifically, the enquiry necessitates an investigation into the ‘intensity’ of the right, the potential for the conduct of a non-state entity to interfere with the right, the appropriateness of limiting one freedom to safeguard another, and the enhanced capacity of government (as opposed to the courts) to solve conflicting rights.¹¹

The remaining provisions of section 8 guide the enforcement of section 8(2). If a constitutional right is found to ‘bind’ a private individual or entity, section 8(3)(a) instructs the courts to ‘apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right’.¹² In essence, and in instances where the legislature has not already done so, the Constitution anticipates that the development of the common law is the means through which the constitutional obligations of private individuals are given legal effect. Section 8 therefore creates a hybrid between the two sorts of horizontal application models. A finding that a constitutional provision binds a private individual or entity serves only as a trigger mechanism, which, in turn, requires the courts to develop private law so as to give practical effect to the right. Section 8(3)(b) continues to read that a court may develop the common law in a manner that infringes a constitutional right provided the limitation is justified in accordance with the section 36 rights-limitation clause.

*The case of Khumalo v Holomisa*¹³

In this matter the Constitutional Court was called upon to decide whether the law of defamation complied with the Constitution. The legal question raised was whether the requirements needed to sustain a claim for defamation unduly encroached upon the media’s right to free expression.¹⁴

In accordance with the common law, a defamation claim succeeds where there is the (i) wrongful and (ii) intentional (iii) publication of a (iv) defamatory statement that (v)

¹¹ See *Daniels v Scribante* 2017 (4) SA 341 (CC) paras 39, 165.

¹² Constitution s 8(2)–(3) must be read alongside Constitution s 172, which mandates the courts to declare invalid any conduct or law inconsistent with the Constitution.

¹³ 2002 (5) SA 401 (CC).

¹⁴ Constitution s 16(1):

Everyone has the right to freedom of expression, which includes

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas.
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

concerns the plaintiff. The plaintiff need however only prove the last three requirements. If a plaintiff establishes that a defamatory statement concerning him was published, the requirements of wrongfulness and intention are presumed. The onus then shifts to the publishing defendant to prove the absence of either wrongfulness or intention. The intention to publish is virtually indisputable when the defamatory statement is contained in a newspaper publication. Media defendants are therefore required to show that the publication was not wrongful. Wrongfulness is a judicial determination into whether it is reasonable to impose liability for the damaging conduct.¹⁵ This determination is based on the value-laden considerations of the public and legal convictions of the community, which, in a constitutional era, must be interpreted in accordance with constitutional norms.¹⁶ Prior to the adoption of the Constitution, the common law recognised three main defences to rebut wrongfulness: truth and public benefit, fair comment, and privileged occasion. To escape legal liability for defamatory statements that are classified as factual averments, the media would accordingly need to prove that the statement is both true and in the public benefit.

The common law therefore favours defamed litigants, because they need not prove falsehood. The media rather assumes the risk of not being able to prove the truth of a defamatory publication. It was the operation of these rules, and the resultant bias in favour of the defamed litigant, that the media contended stood in contrast with the Constitution. They argued that the law of defamation effectively creates a self-censorship on publication since truth is at times difficult to prove. In other words, media houses are reluctant to publish material if it is difficult or perhaps even impossible to prove the truthfulness of a statement before a court of law even though the information falls within the public interest. The court accepted this point.¹⁷ The pre-Constitution rules of defamation created a ‘chilling effect’ on the publication of information in the public interest because it hampered the constitutionally protected interests of both the media to impart information and individuals to receive such information.¹⁸

¹⁵ *Country Cloud Trading v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) para 20; *Fetal Assessment Centre* (n 8) para 67.

¹⁶ *Loureiro v Invula Quality Protection* 2014 (3) SA 394 (CC) para 53; *Le Roux v Dey* 2011 (3) SA 274 (CC) para 122.

¹⁷ *Khumalo* (n 13) para 38.

¹⁸ *ibid* paras 22, 39.

The court hooked the dispute onto section 8(2) of the Constitution, and did so by adopting a paradoxical reasoning. The judgment shows no attempt to interpret either of the two most applicable rights in this matter as binding a private individual or entity, namely freedom of the press or the right of a politician to have his human dignity respected. Rather, in order to establish jurisdiction, the court invoked the constitutional rights of individuals who were not a party to the dispute: the right of each person to free expression, which includes the right to receive information and ideas.¹⁹ The judgment records three motives for protecting expression. The ability to receive and impart information and ideas (i) secures and advances human dignity and autonomy; (ii) enables individuals to make responsible political decisions, which supports the democratic project of the Constitution; and (iii) enhances the capacity of individuals to participate in public life.²⁰ The court observed that the media is a ‘key agent’ in ensuring that these rationales of the right are realised.²¹ The ‘ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their mandate.’²² The media will either strengthen the functioning of democracy or harm the goals of the new constitutional order.²³ This led the court to conclude that the media are duty bearers of the right to freedom of expression, and that this duty is owed to all individuals.

Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution.²⁴

In essence, the court burdened the media with a constitutional obligation in order to (as will be shown below) heighten the level of constitutional protection afforded to them.

Having satisfied itself that the matter fell within the purview of a section 8(2) application, the court proceeded to investigate whether the common law should be

¹⁹ Constitution s 16(1)(a)–(b). See *Khumalo* (n 13) paras 22, 24, 34.

²⁰ *Khumalo* (n 13) para 21.

²¹ *ibid* para 22.

²² *ibid*.

²³ *ibid* para 24.

²⁴ *ibid* para 33. See also *NM v Smith* 2007 (5) SA 250 (CC) paras 132, 136. In a minority opinion, O’Regan J held that the section 14 right to privacy binds private individuals and entities. The right to privacy entitles each person to choose what private information is disclosed publicly, and that state and non-state actors alike are under an obligation to respect this component of the right.

developed. To secure the right to free expression, and to eliminate the risk of a ‘chilling effect’ on the publication of matters that are of political or public importance, the media argued that the common law of defamation should be developed to require the defamed plaintiff to prove that the defamatory statement is false. The scope of the proposed rule was however limited. The shift of onus would only apply in circumstances where the plaintiff was a political official or politician and the subject of the defamatory publication concerned a matter of public importance or interest. In sum, the media argued for a watered-down version of *New York Times v Sullivan*. In that case, the United States Supreme Court interpreted the First Amendment to the United States Constitution — which protects the freedom of speech of the press — as preventing public officials from succeeding in defamation claims unless the statement is both false and published with ‘actual malice’.²⁵ In prescribing this high threshold, which renders it nearly impossible for a public official to succeed in a defamation claim, the Supreme Court weightily tilted the scale in favour of free speech over other countervailing private interests such as the protection of individual reputation. Returning to *Khumalo*, the media did not advocate the ‘actual malice’ standard, but they did argue that public officials must prove a defamatory statement as false in order to succeed. They therefore advanced the contention that freedom of political speech requires an elevated protection in South Africa’s constitutional democracy.

The media’s proposed approach proved unpalatable for the court. Freedom of expression is neither absolute nor is it a right that enjoys a preferential status. On the other side of the equation are countervailing interests, including the constitutionally protected value of human dignity.²⁶ Human dignity encapsulates self-worth and reputation.²⁷ The Constitution safeguards the human dignity of each person, and there is no justification for automatically withholding this protection in the context of a public

²⁵ *New York Times v Sullivan* (1964) 376 US 254, at 280. The United States Supreme Court requires ‘state action’ to review laws. In *Sullivan* at 265–92, the court held that a state (including state courts) are prohibited under the First and Fourteenth Amendment from awarding damages to a public official if a defamatory false statement is not published without ‘actual malice’. See also *Shelley v Kraemer* (1948) 334 US 1 (though racially restrictive covenants are not a violation of the Constitution, the judicial enforcement of such a covenant would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment as the actions of state courts in such matters would be covered under the state action doctrine).

²⁶ Constitution s 10: ‘Everyone has inherent dignity and the right to have their dignity respected and protected’. *Khumalo* held at paragraph 27 that the right to privacy (section 14) is connected to the right to have your human dignity respected.

²⁷ *Khumalo* (n 13) para 27.

official.²⁸ The court held that merely shifting the onus of proof to the defamed plaintiff would result in a zero-sum outcome because falsehood is also difficult to prove.²⁹ Such a rule would encroach upon the constitutionally protected interests of the defamed plaintiff in much the same way that the application of the current common law rule interferes with the rights of a media defendant. To afford protection to both interests, the court concluded that the common law of defamation must establish mechanisms that strike ‘an appropriate constitutional balance between freedom of expression and human dignity.’³⁰

The court found this balance to exist in a recent decision of the Supreme Court of Appeal (SCA). In *National Media v Bogoshi*, the SCA introduced the concept of ‘reasonable publication’ as the fourth main defence that a media defendant may invoke to rebut wrongfulness.³¹ The reasonableness defence permits a defendant to escape liability for a false and defamatory allegation where ‘upon a consideration of all the circumstances of the case it is found to have been reasonable to publish the particular facts in the particular way and at the particular time’.³² The enquiry into the reasonableness of the publication includes assessing the tone of the accusations, the nature of the information, the reliability of a source, the steps taken to verify the accuracy of the information, and whether the statement was political discussion.³³ The Constitutional Court held that—

[w]here the Supreme Court of Appeal not to have developed the defence of reasonable publication in *Bogoshi*’s case, a proper application of constitutional principle would have indeed required the development of our common law [...]. However, the defence of reasonableness developed in that case does avoid a zero-sum result and strikes a balance between the constitutional interests of plaintiffs and defendants. It permits a publisher who can establish truth in the public benefit to do so and avoid liability. But if a publisher cannot establish the truth, or finds it disproportionately expensive or difficult to do so, the publisher may show that in all the circumstances the publication was reasonable.³⁴

Finding the common law of defamation constitutionally compliant, the court dismissed the application. This compliance was secured through the ‘reasonable

²⁸ *ibid* paras 25, 43.

²⁹ *ibid* para 42.

³⁰ *ibid*.

³¹ 1998 (4) SA 1196 (SCA).

³² *ibid* at 1212G.

³³ *ibid* at 1212H.

³⁴ *Khumalo* (n 13) para 43.

publication' defence, which, this dissertation argues, is a form of the balancing process. Instead of providing freedom of expression an elevated status over human dignity, or vice-versa, the court preferred to entrench in the common law of defamation a balancing enquiry that enables the specific facts and circumstances of the case to determine the prevailing interest. Though guidance is provided on how to evaluate the reasonableness of a publication, the process remains flexible and context specific.

One last aspect of *Khumalo* must be noted. The judgment presents the balancing process as the only possible solution that satisfies the Constitution. This is doubtful. Section 8(3)(b) of the Constitution stipulates that a court, when developing the common law to give effect to a constitutional right, is permitted to limit another constitutional right provided that the limitation satisfies section 36(1) of the Constitution. This provision is the rights-limitation clause, and permits any law of general application to limit a constitutional right provided that the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom'.³⁵ Conceivably, an approach that elevates one right above another in the abstract is permitted. The *Khumalo* judgment remains silent however on whether or not a rule that automatically discounts the dignity and privacy interests of a public official is a justifiable limitation under section 36(1). In failing to use the section 36 limitation clause, the *Khumalo* court established a new type of rights balancing process, one that takes place within the common law.

Following the *Khumalo* judgment, varying forms of this balancing exercise continue to find traction in the law of defamation.³⁶ The SCA crisply summarised the position as follows.

In the final analysis, whether conduct is to be adjudged lawful or not depends on a balancing of the constitutionally enshrined right of dignity, including as it does the right to reputation on the one hand, and the right to freedom of speech, on the other. This may involve [the reasonableness test proposed in *Bogoshi*]. But, the above notwithstanding, the well-established defences and the rules relating to each are both useful and convenient and in addition have the advantage of affording litigants a degree of certainty. Nonetheless, in their application and development, sight should not be lost

³⁵ Constitution s 36(1) is quoted in chapter 3, sec 1.

³⁶ For additional examples of balancing expression against privacy/dignity within the law of defamation, see *Le Roux* (n 16) paras 124–28, 171; *The Citizen v McBride* 2011 (4) SA 191 (CC) paras 79–86, 97–102, 141–153; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) paras 90–92.

of the constitutional values underlying [the defences'] true object which is the rebuttal of unlawfulness.³⁷

3 Values-based application: section 39(2) of the Constitution

Section 39(2) of the Constitution reflects a form of indirect application. The provision states, in part, that courts—

when developing the common law or customary [indigenous] law [...] must promote the spirit, purport and objects of the Bill of Rights.

Section 39(2) is a powerful provision. It demands that the entirety of the human rights system that underpins the South African constitutional order reverberate through every area of the law, including those parts that are often considered as insulated from human right norms. The provision provides credence — and a doctrinal basis — to the belief that the Constitution is not merely a formalistic legal document but that it also operates as an ‘objective normative value system’ that serves as a ‘guiding principle’ to all branches of government.³⁸ Read alongside section 173 of the Constitution — which confirms that the high courts, Supreme Court of Appeal, and the Constitutional Court enjoy the inherent power to develop the common law taking into account the interests of justice — section 39(2) instructs the courts to infuse the ‘pervasive normative effect’ of the Constitution into the common law.³⁹

The trigger mechanism of section 39(2) is not clear, however, at least when compared to the more structured framework set out in section 8 of the Constitution.⁴⁰ The provision offers zero instructions as to when the courts should develop the common law. A conservative, though plausible, interpretation of section 39(2) is that the duty upon the judiciary to promote the values underlying constitutional rights is only activated once a court decides that there is a non-constitutional reason to develop the common law. The conditional ‘when’ supports this reasoning. If this conservative interpretation were

³⁷ *Hardaker v Phillips* 2005 (4) SA 515 (SCA) para 15, which was quoted with approval in *Le Roux* (n 16) para 124.

³⁸ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 54.

³⁹ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 15. See *Mokone v Tassos Properties* 2017 (5) SA 456 (CC) para 68 (what the ‘interests of justice’ requires in accordance with section 173 of the Constitution depends on the circumstances of the case, which is an enquiry that can be ‘quite wide’).

⁴⁰ *Thebus v S* 2003 (6) SA 505 (CC) para 27.

followed, it would suggest that the influence of the Constitution remains constrained by the internal logic and rhythm of the common law. In accordance with this view, any development to the common law must take place on an incremental basis, and, at all times, show a high degree of respect to the law-making role of the legislature.⁴¹ The Constitutional Court has rejected the most conservative interpretation, reasoning that it is the Constitution itself that demands the realignment of private law with constitutional right norms. However, the court's case law oscillates between differing accounts as to when the obligation is actually triggered. In a handful of judgments, the court has held that the duty upon the judiciary to develop the common law is present even if the litigating parties have not themselves raised the issue.⁴² Other judgments hold differently. Here, the court has remarked that the primary onus still falls upon the litigating parties to raise any request for the development of the common law from the outset of litigation, and, as a general rule, judges should not plead cases on behalf of litigants.⁴³ It appears that the severity of the human rights violation is the most determinative factor. The court's uncertain position on the trigger mechanisms is perhaps best reflected in this passage from a leading judgment on section 39(2).

It needs to be stressed that the obligation of the court to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.⁴⁴

⁴¹ *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC) para 31. The conservative approach reflects the position of the Supreme Court of Canada. See *Retail, Wholesale & Department Store Union v Dolphin Delivery* (1987) 33 DLR (4th) 174 (SCA) paras 34, 36, 39.

⁴² See *Carmichele* (n 38) para 39; *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) para 5.

⁴³ *Everfresh Market Virginia v Shoprite Checkers* 2012 (1) SA 256 (CC) paras 63–67; *Mighty Solutions v Engen* 2016 (1) SA 621 (CC) para 39.

⁴⁴ *Carmichele* (n 38) para 39. See also discussion on the cautious approach judicial officers should employ when raising a constitutional issue of their own accord, particularly if it is desirable to obtain legislative inputs, in *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate* 2014 (1) SA 521 (CC) para 39; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 (4) SA 222 (CC) paras 38–42.

The scope of section 39(2) is also unclear. While the purpose of the provision is to ensure that all law corresponds to the values of the supreme law, the court has nevertheless warned against a robust application of section 39(2). The need to respect the role of the legislature as the principal institution responsible for law reform is often cited as a justification for judicial reservation. Lower courts are warned to ‘take into account the wider consequences of the proposed changes’ to the law, suggesting that judges should steer away from radical and complex changes.⁴⁵ This is particularly the case where public policy considerations present more than one compelling choice.⁴⁶ There are times however that the court ignores its own advice. In a recent judgment, for instance, the court wrote that the section 39(2) obligation is ‘extensive’.⁴⁷ The provision requires courts to be ‘alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue’.⁴⁸ In contradiction to some of their previous holdings, the court also noted that the judicial power to develop the common law does not violate the separation of powers doctrine as the legislature remains free to amend or abrogate common law rights provided their alternations do not result in an unjustifiable limitation of a constitutional right.⁴⁹

In addition to safeguarding the role of the legislature, section 39(2) earmarks and protects the function of lower courts in the rebuilding project. The Constitutional Court usually declines to pronounce itself on the development of the common law unless the SCA and high courts have expressed an opinion on any proposed development. This

⁴⁵ *Mighty Solutions* (n 43) para 38; *Masiya* (n 41). The Constitutional Court has cited with approval the Canadian Supreme Court decision of *R v Salituro* [1991] 3 SCR 654 at 666G-H, 670F-I:

Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law. [...] In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform [...]. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.

See *DE v RH* 2015 (5) SA 83 (CC) para 16; *Carmichele* (n 38) para 36; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 61.

⁴⁶ *Paulsen v Slip Knot Investments* 2015 (3) SA 479 (CC) para 57.

⁴⁷ *ibid* para 116.

⁴⁸ *ibid*.

⁴⁹ *ibid*.

restraint is of ‘particular importance’.⁵⁰ The SCA has an ‘expertise in the common law’, and the apex court should therefore not exercise its jurisdiction without the legal question first being ventilated before the SCA.⁵¹ The common law is at times capable of an assortment of varying developments, all of which may comply with section 39(2). It is therefore best to allow the SCA and high court an opportunity to evaluate what sort of development is the most beneficial in terms of both the internal logic of the common law and changing perception of values in society before the Constitutional Court conclusively resolves the matter.⁵²

*The case of Barkhuizen v Napier*⁵³

The matter investigated whether, and, if so, how, the Constitution limits the freedom to contract. The *Barkhuizen* judgment centred upon a time limitation clause in a commercial insurance contract which stipulated that a claimant only has 90 days to institute legal action for a repudiated insurance claim. The impugned contract insured against the risk of loss of a motor vehicle. Following a motor vehicle accident, the insurer rejected a claim on the basis that the vehicle was not used for a private purpose as required in the contract. The claimant failed to institute legal proceedings within the 90 day time period, and only did so two years after the repudiation. To overcome the time bar clause, the claimant, presumably following the methodology of direct application as established in *Khumalo*, argued that the clause was unconstitutional and therefore unenforceable on the ground that it was contrary to section 34 of the Constitution. This provision safeguards the right to have a legal dispute resolved in a fair and public hearing before a court.⁵⁴

The Constitutional Court endorsed its earlier holding that all law is subject to the Constitution. This includes the private common law, which means that the validity of all the common law rules of contract depend on their consistency with the Constitution.⁵⁵

⁵⁰ *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) para 33. See also *Khumalo* (n 13) para 13

⁵¹ *Amod* (n 50).

⁵² *Carmichele* (n 38) paras 56–58.

⁵³ 2007 (5) SA 323 (CC).

⁵⁴ Constitution s 34 (‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’).

⁵⁵ *Barkhuizen* (n 53) para 15.

The court however proceeded to reject the direct application model for purposes of testing the constitutional validity of contractual provisions.

The primary reason for this holding, the court explained, is that the Constitution offers no structural methodology to identify the extent to which constitutional rights curtail the capacity to contract.⁵⁶ The formulation of the section 36(1) rights-limitation clause sets out that any right may be limited provided that the limiting action is authorised by a ‘law of general application’ and then only to the ‘extent that it is reasonable and justifiable’. The court reasoned that a contractual provision between two private parties cannot be classified as a law of general application.⁵⁷ Though not mentioned in the judgment, the immediate problem that arises where the court has no structure to identify how constitutionally protected interests may be limited against other interests is that it may create the untenable position that constitutional rights become absolute in respect to private relationships. Consider for a moment the facts of *Barkhuizen*. If the right to access courts finds direct application and one accepts that the court is correct that the limitations clause is unusable, then time bar clauses would be outright prohibited even though contracting parties in the exercise of their autonomy would prefer to place this type of limitation on one another as a means to increase the efficiency of their transaction. That outcome is highly undesirable, as it would automatically negate other constitutional values. As the SCA has previously held, the enforcement of contractual agreements, which gives credence to the exercise of personal autonomy, secures the constitutional values of freedom and human dignity.⁵⁸ Furthermore, legal uncertainty is created when courts invalidate contractual agreements, an outcome that is considered inimical to the constitutional principles of legality and the rule of law.⁵⁹

The *Barkhuizen* judgment is therefore premised on a distinction between the rules of contract law (law) and contractual provisions (conduct). For reasons that are not entirely clear, and to which the discussion in this chapter will return, the court summarised the problem for resolution as one not pertaining to the constitutional validity of the rules of the law of contract but rather one that pertains to the validity of private conduct (in the form of a contractual clause). To circumvent the difficulties of applying

⁵⁶ *ibid* paras 23–26.

⁵⁷ *ibid*.

⁵⁸ *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at para 94.

⁵⁹ *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) para 39.

constitutional rights to contractual clauses, the court concluded that a more indirect approach was required to control contractual autonomy. This should be done in accordance with section 39(2) of the Constitution. The appropriate method for invalidating a contractual clause is through the common law doctrine of public policy, as informed by constitutional values.⁶⁰

The pre-Constitution common law of contract

A trite principle of the South African common law is that contractual clauses contrary to public policy are unenforceable. The standard required to nullify a clause on this ground is notoriously high, however. In a pre-Constitution decision, the Appellate Division held that the judicial power to invalidate a contractual term on the ground of public policy should be reserved only for the 'clearest of cases in which the harm to the public is substantially incontestable'.⁶¹ Few cases met this standard. The high threshold is partly due to the fact that the enquiry is purely an intrinsic test. That is, the test is directed solely towards investigating whether the challenged transaction has a tendency or a reasonable likelihood to lead to a result that is 'clearly inimical' to the interests of the community as a whole.⁶² This determination is made having regard to the overall purpose of the contract, which is discerned from the provisions of the contract as well as the objective circumstances of the case at the time of concluding the contract.⁶³ The focus of the intrinsic test bears repeating. The enquiry investigates whether the contract is likely to cause a manifest harm to the public.⁶⁴ The harm actually suffered by the contracting party is swept to the periphery of the enquiry, and is only relevant if it can support the claim that harm would be inflicted upon the community as a whole. The Appellate Division decision of *Sasfin* illustrates this point.⁶⁵ Here, the court declared against public policy a contractual clause that would have effectively relegated one person to the

⁶⁰ *Barkhuizen* (n 53) para 28.

⁶¹ *Sasfin v Beukes* 1989 (1) SA 1 (A) at 9F–G. See also *Botha v Finanscredit* 1989 (3) SA 773 (A) at 783J.

⁶² The 'interests of the community' is sometimes referred to as the 'legal conviction of the community' or the 'boni mores'.

⁶³ *Juglal v Shoprite Checkers* 2004 (5) SA 248 (SCA) para 13. *Botha* (n 61) at 783B–C; *Sasfin* (n 61) at 14F; *Eastwood v Shepstone* 1902 TS 294 at 302. The courts employ an assortment of synonyms to describe a contractual term against public policy. This includes unconceivable, oppressive, improper, and unduly harsh.

⁶⁴ *Standard Bank v Wilkinson* 1999 (3) SA 822 (C) at 828F.

⁶⁵ *Sasfin* (n 61).

position of a 'slave' working for the benefit of another person. Slavery is no doubt an individual harm, but the analysis of the court makes it clear that the declaration of enforcement was grounded on the understanding that forced servitude is incompatible with the public interest.

The limited scope of the intrinsic-based test resulted in a narrow construction of the type of clauses that are 'clearly' contrary to the interests of the community. Declarations of unenforceability were reserved for clauses that are plainly unlawful,⁶⁶ unconscionable and contrary to public morality,⁶⁷ or are otherwise required to be set aside as a matter of social or economic expedience.⁶⁸ The intrinsic test ignores the actual results that flow from enforcing the contract. External considerations, meaning those considerations not apparent from the terms of the contract, were of little to no relevance. The courts repeatedly declined to consider factors such as the motives of the contracting parties, the circumstances under which a party elects to enforce a contractual clause, the identities and positions of the parties, or the general fairness of the ensuing result.

The legal policy underpinning the intrinsic test is threefold. First, the utility of contract law is premised on contracting parties performing the obligations they had voluntarily undertaken. Parties arrange their activities on the understanding that certain consequences will flow from a contract, and the law should not frustrate these expectations. This too is a requirement of public policy. Parties should not be free to escape the obligations they have undertaken if they come to realise they had struck a bad bargain. At the time of concluding a contract, all individuals hold a veto power over any possible obligation. It is at this stage that contracting parties are required to ensure that their individual interests are adequately protected, and no person should anticipate reprieve from a burdensome obligation. Second, the intrinsic test gravitates towards universal and consistent application.⁶⁹ The function of the courts is confined to

⁶⁶ *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC) para 57.

⁶⁷ *Juglal* (n 63) para 12 ('If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provisions is neutral then the offending tendency is absent. In such an event the creditor who implements the contract in a manner which is unconscionable, illegal, or immoral will find that the court refuses to give effect to his conduct but the contract itself will stand.').

⁶⁸ *Botha* (n 61) at 782I–783C; *Eastwood* (n 63).

⁶⁹ The introduction of the public policy test into South Africa demonstrates the move towards intrinsic-based test. The use of public policy as a means to invalidate contractual provisions grew to fruition only after the Appellate Division's decision in *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A). Here, the AD scratched-out the *exceptio doli generalis* defence from the rulebooks. The *exceptio doli generalis* was an equitable defence that permitted a court to deny

identifying the types of clauses that are against public policy. The courts can, for example, declare against public policy contracts for the sale of illegal narcotics or those that result in forced servitude. The harm these contracts have on the public interest is clear, and the ruling can be applied without modification in future matters. The enquiry does not depend on each judge assessing whether a particular contract was unfair or unreasonable within the particular facts of a case. In other words, the test aims to promote legal certainty by insulating the idiosyncratic views of individual judges.⁷⁰ Third, the narrow construction of the test prevents the proverbial floodgates of litigation from bursting open and swamping the courts.⁷¹

The impact of the Constitution on contract law

The scope of the public policy enquiry has expanded in the democratic era. In a constitutional order that prizes human dignity, equality, and the advancement of human rights as part of its foundational values, it is indisputable that classical liberal notions of private autonomy should no longer be afforded the supremacy it once enjoyed under the common law. To the extent that they clash, freedom of autonomy including the freedom to contract must now be weighed against other countervailing constitutional values. In the words of the *Barkhuizen* court:

What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions in the Bill of Rights. Thus a term in a contract

a claim of specific performance if doing so would be unconscionable. The demise of the defence was on account of two reasons. First, the defence was never actually part of the Roman-Dutch Law transplanted into South Africa. Second, the defence was criticised for being too vague and discretionary. It resisted consistent application, and the critics believed that the defence unwisely permitted courts to consider the fairness of contractual provisions despite the contracting parties having voluntarily undertaken those obligations. See Graham Glover, 'Lazarus in the Constitutional Court: An Exhumation of the Exceptio Doli Generalis?' (2007) 124 *SALJ* 449, 450.

⁷⁰ A prominent example is a series of inconsistent high court judgments in the early 1990s, which all pertained to whether a particular type of surety agreement was against public policy. The oscillating trend was halted in *Wilkinson* (n 64). A high court of three judges ruled that the test must be applied strictly – that is, a declaration of unenforceability will only result when the clause is 'clearly inimical' to the interests of the community. The concern of the court was that an expansive reading of the rule in *Sasfin* (n 61) would continue to lead to inconsistent results.

⁷¹ The argument that flexibility in decision-making will invariably inundate the courts should be treated with scepticism. These claims are normally not accompanied by supporting evidence. In fact, flexibility in decision-making is seen in nearly every aspect of the law, and there is little evidence that such processes have crippled the courts. See *Fetal Assessment Centre* (n 8) para 70.

that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.⁷²

The scope of the enquiry has expanded in two ways. First, harms to the community now also incorporate violations to the personal interests safeguarded by constitutional rights. The enquiry has therefore become more individual-centric. Second, the enquiry is no longer purely an intrinsic-based test. Public policy now incorporates a second prong: the extrinsic-based test. The law reports record a slowly growing body of cases where some courts have been willing to investigate whether the enforcement of an otherwise valid contractual provision causes a result that is inimical to the interests of the community. That is, the result of enforcement leads to a situation that is classified as an unwarranted infringement of a constitutional value or right,⁷³ or is otherwise unconscionable, illegal or of immoral conduct.⁷⁴ The extrinsic test therefore also amplifies the focuses on individual harms. The test examines the actual results that flow from enforcement, which requires courts to consider circumstances that are external to the terms of the contract. The growth of the extrinsic-based test is partly due to the increasing role of good faith within the jurisprudence of the Constitutional Court.⁷⁵ Good faith is a value that is said to underpin both contractual relationships and the new constitutional order. The general idea promoting good faith in contractual relationships is that legal agreements are not individualistic acts. The process of concluding a contract, and thereafter the performance of undertaken obligations, is also a means to respect the dignity, freedom, and equal worth of our contracting parties.⁷⁶ Contracts serve to mutually enhance the position of both parties. When viewed through the prism of the Constitution, the court has held, the underlying assumption of the law of contract is that parties conclude agreements in good faith and that they do so in order to obtain a benefit

⁷² *Barkhuizen* (n 53) para 29.

⁷³ *Barkhuizen* (n 53) paras 69–70; *Bredenkmap* (n 59) paras 47–48; *Maphango v Aengus Lifestyle Properties* [2011] 3 All SA 535 (SCA) para 26; *Combined Developers v Arun Holdings* 2015 (3) SA 215 (WCC) para 37. See *Brisely* (n 58) para 17 (the court assumed that the ratio in *Sasfin* could be applied to the results that flow from the enforcement of contracts). See also *Makate v Vodacom* 2016 (4) SA 121 (CC) paras 96–97, 100 (the Constitutional Court noted that a cause of action grounded exclusively in a duty to show good faith in contractual relations is a difficult legal standard to implement as the test escapes objective and consistent application).

⁷⁴ *Juglal* (n 63) para 12.

⁷⁵ In support of good faith as a legal doctrine, see the concurring judgment of Olivier JA in *Eerste Nasionale Bank v Saayman* 1997 (4) SA 302 (SCA); *Mort v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 474–75.

⁷⁶ *Botha v Rich* 2014 (4) SA 124 (CC) para 46.

from one another.⁷⁷ Since it is assumed that parties contract in good faith, it should be expected that contracting parties show good faith at the time of performance as well. The underlying value of good faith does not — or, at least, should not — dissipate after entering into a contract.

The extrinsic prong of the public policy enquiry is still in its jurisprudential and doctrinal infancy, and requires further development if it is to be sustainable.⁷⁸ This is needed because some lower court judgments have shown a strong resistance to this emerging prong of the test built on the ‘free-floating’ value of good faith.⁷⁹ The objection is predictable. The extrinsic test erodes legal certainty. The evaluation of extra-contractual considerations is a problematic exercise, as it remains unknown which considerations should be measured and what weight those considerations should be afforded in deciding whether to nullify the expectations of contracting parties.

Returning to the *Barkhuizen* judgment: in search of relevant constitutional values to inform the notion of public policy in respect to time bar clauses, the court proceeded to extrapolate from the constitutional right to have access to courts the constitutional value of access to courts. This value was determined by the primary rationales served by the right: democratic and orderly societies require independent tribunals to ensure the fair and orderly resolution of disputes. This prevents self-help, vigilantism and chaos.⁸⁰

To determine whether a contractual clause limiting access to courts is ‘inimical’ to the values enshrined in the Constitution, and therefore against public policy and unenforceable, the *Barkhuizen* court prescribed the following test to mediate the conflicting values of contractual autonomy and access to courts: though time limitations are permitted they must nevertheless provide an aggrieved party ‘an adequate and fair opportunity to seek judicial redress’.⁸¹ This test asks two questions; an affirmative answer to either will result in the time bar clause being unenforceable. The first is whether the contractual clause itself is manifestly unreasonable (the intrinsic test).⁸² This

⁷⁷ *ibid* para 24.

⁷⁸ See *Barkhuizen* (n 53) para 82; *Everfresh* (n 43) paras 37,72.

⁷⁹ *Afrox Healthcare v Strydom* 2002 (6) SA 21 (SCA) para 32; *Bredenkamp* (n 59) paras 52–53; *African Dawn Property Finance 2 v Dreams Travel and Tours* 2011 (3) SA 511 (SCA) para 28; *Maphango* (SCA) (n 73) paras 22–25; *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) paras 32–34.

⁸⁰ *Barkhuizen* (n 53) paras 31–33.

⁸¹ *ibid* paras 51–52.

⁸² *ibid* paras 56, 63.

enquires into the terms of the contract and requires the court to balance competing constitutional values. These values are, on the one hand, the need to ensure that contractual agreements that were freely and voluntarily undertaken are enforced, and, on the other, the need to ensure contracting parties have the opportunity to seek judicial redress.⁸³ Time bar clauses that provide no or extremely short time periods would fail to meet this requirement. If the clause itself is found to be reasonable, the second question is whether it is nevertheless ‘unfair and unreasonable’ to insist on compliance given all the circumstances of the case and having regard to the reasons for the failure to comply with the time bar clause (extrinsic test).⁸⁴ Though the court does not provide much elaboration on this point, the court held that factors outside the control of the contracting party would be considered.⁸⁵ The extreme example provided is that it would be unreasonable to expect a comatose person to meet a contractual undertaking.⁸⁶

On an assessment of the facts, the court found the 90 day time limit not to be manifestly unreasonable and further found no acceptable reason as to why proceedings were only instituted two years after the repudiation. The application was accordingly dismissed. The potential conflict between the constitutionally protected values of autonomy and access to courts steered the court away from prescribing fixed and concrete rules. Once again, a flexible balancing process, namely that time bar clauses must provide an ‘adequate and fair opportunity for judicial redress’, was incorporated into private law.⁸⁷

⁸³ *ibid* para 57.

⁸⁴ *ibid* paras 58, 69.

⁸⁵ *ibid* para 84.

⁸⁶ *ibid* para 69.

⁸⁷ For further examples of the balancing process in the law of contract, which seek to balance contractual autonomy against a competing constitutional value, see *Cool Ideas* (n 66) para 56 (though it will ordinarily be contrary to public policy to enforce an arbitral award that disregards a statutory provision, the courts must ultimately weigh the force of the statutory prohibition against the important goals of private arbitration); *Botha* (n 76) para 49 (the court precluded a contracting party from cancelling a contract as the penalty clause would have burdened the breaching party with a ‘disproportionate sanction’). See also *Bredenkamp* (n 59) paras 43–48; *Maphango* (SCA) (n 73) para 26.

4 Different start points lead to a similar outcome

A comparison of *Khumalo* and *Barkhuizen* shows that a similar outcome ensues regardless of whether a rights-based or value-based approach is applied. In both judgments, the court rejects arguments that seek to interpret a particular constitutional right norm as enjoying preference over another. Rather, in situations where a potential clash of constitutionally protected interests may occur, the court adopts within private law a balancing process that allows the specific facts and surrounding circumstances of the case to determine the prevailing interest. The process adopted in *Khumalo* is of course somewhat different to the one in *Barkhuizen*, which is due to the adaptable characteristic of the balancing process as it moulds itself into the rules and principles of private law. Further, each new balancing process is adopted alongside a unique set of broad factors that are derived from the rights (or values) implicated in the conflict. The balancing process therefore assumes a wide array of structures and labels. Yet, despite any variance that may be observed on account of the different legal frameworks, these balancing processes are established to serve a similar function. Through sections 8 and 39(2), the Constitution seeks to ensure that private individuals and entities do not wield their rights in a manner that unduly and without a justifiable explanation encroaches upon the constitutionally safeguarded interests of others.⁸⁸

To further illustrate the material similarity between the outcomes in the two judgments, one must probe whether the *Barkhuizen* court's reliance on a distinction between private conduct and law is useful. In contrast to *Khumalo* where private law was reviewed, the *Barkhuizen* court held that the issue for resolution was not whether the rule of contract law was lawful but whether the private conduct (which is performed in accordance with a rule of contract law) was lawful. This characterisation is mistaken. It is a well-recognised principle that private law permits conduct unless it is expressly prohibited. Time bar clauses are permitted because the law of contract does not prohibit them. For the same reasons that the direct application to *conduct* model is no different to the direct application to *law* model (as set out in chapter three), the court's artificial distinction between private law and private conduct is indefensible.⁸⁹ There is a vital

⁸⁸ Chapter five elaborates on this statement.

⁸⁹ Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 775, 762. See also Johan van der Walt, *Law and Sacrifice* (Birkbeck Law Press 2005) 40–45 (applying a Hohfeldian analysis, the author critiques early dicta from the court that implies the absence of legal rule cannot be judicially reviewed; in private law, the absence of an express right or duty means that there is still the existence of a no-right or privilege).

distinction between the constitutional review of public and private power. Public power must be bestowed in accordance with a law that affords and delineates the power.⁹⁰ An express source of law thus enables the exercise of public power. A litigant aggrieved by the exercise of public power has two options. The litigant can either challenge the absence of authority (i.e. there is no law that authorises the public conduct) or challenge the enabling authority as incompatible with the Constitution. In some sense, the review of public power in South Africa is made easier because there is always an express empowering provision. This benefit is not always available in private disputes as the exercise of private power is permitted because there is no express law that prohibits the action. However, the lack of an express rule is still part of the law, and a legal system that requires the horizontal application of rights must recognise this feature.⁹¹ This point is reinforced by the manner in which the court developed the common law, which was to restrict certain types of private *conduct* under certain conditions. The court carved away at the *pacta sunt servanda* principle (all agreements must be complied with), and created an exception to contractual autonomy which requires time bar clauses to provide a reasonable and fair opportunity for judicial redress. This act of developing the common law is similar to that witnessed in *Khumalo*. In other words, the judicial process of translating constitutional rights and values into the private common law is dependent neither on whether a different provision is used nor whether an express rule existed. The application of sections 8 and 39(2) both lead to the same point: a rule of private law fails to meet a constitutional standard, and the same law-making judicial skillset will be relied upon to remedy the deficiency. The point here is that the task of judicial law-making will invariably be contained by certain universal factors. Courts tend to favour incremental adjustments over robust acts of law reform, and new developments in the law are nearly always formulated in a manner that enables future courts to adapt to specific disputes.

The similarity between *Khumalo* and *Barkhuizen* leads to an important question, which has received extensive debate in South African literature: is there an appreciable difference between rights-based application and value-based application? The discussion

⁹⁰ See *AAA Investments v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) para 68; *Executive Council, Western Cape Legislature v President of the Republic* 1995 (4) SA 877 (CC) para 62.

⁹¹ Jürgen Schwabe, *Die Sogenannte Drittwirkung der Grundrechte* (W. Goldmann 1971) 16–17, translated by Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter 2014) 222 (‘The coercion that private individuals impose on bearers of fundamental rights is sanctioned by the state. A superior private force that imposes itself on others depends fundamentally on the legal order of the state and not on the personal power of an individual citizen’).

so far suggests not, but to confirm this answer we must venture beyond our national borders in order to identify the initial reason why constitutional values emerged as a tool of legal reasoning. Germany and Canada were amongst the first jurisdictions to incorporate the indirect horizontal application model into their constitutional orders, and the courts in these countries did so as a way to reconcile two competing interpretations.⁹²

On the one hand, these foreign constitutions entrenched rights primarily as a means to control and limit the actions of the state. This intention is evidenced in the manner that rights were formulated, as well as the fact that both national constitutions ignore private actors in their application clause.⁹³ In these countries, the rights-based application model would violate the express commands of their respective Constitutions. As the German Federal Constitutional Court explained in the seminal decision of *Lüth*, there is ‘no doubt that the main purpose of basic rights is to protect the individual’s sphere of freedom against the encroachment of public power’ and consequently the device for vindicating basic rights ‘lies only in respect of acts of public power.’⁹⁴

On the other hand, however, the German and Canadian supreme courts viewed the purpose of constitutional rights as more than just a code for limiting state actions. Casting the ambit of constitutional rights in wide terms, these courts interpreted the underlying justification of rights to encompass the security and advancement of human autonomy.⁹⁵ And the fulfilment of this objective should not depend on whether the state is directly responsible for the encroachment upon the freedom. As the *Lüth* court reasons when permitting horizontality despite not having express constitutional authority for doing so, the impact of the supreme law extends beyond the realm of public law as it also ‘erects an objective system values’.

This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system [...]. It

⁹² Möller (n 10) 37.

⁹³ Basic Law of the Federal Republic of Germany, 1949, art 1(3); Canadian Charter of Rights and Freedoms, 1982, s 32(1).

⁹⁴ *Lüth* BVerfGE 198, 205 (1958). Translation taken from two sources: Donald Kommers and Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 57; and Tony Weir, *Lüth-Decision*, *Foreign Law Translations*, University of Texas.

⁹⁵ See chap 5, sec 1.

naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.⁹⁶

In sum, the initial reason the judicial debate between rights-based application (direct) and value-based application (indirect) arose was to determine whether or not constitutional right norms apply to private conduct and law.⁹⁷ The introduction of value-based application granted these foreign courts a constitutional basis to answer this question in the affirmative. The debate was never about the scope of right norms, nor was it about the extent of their application. This is because constitutional values are derived from the underlying purpose served by constitutional provisions, and they therefore add nothing new to the process of legal reasoning given that all constitutional provisions are interpreted in accordance with the aim they seek to achieve.⁹⁸ The conclusion that constitutional values equate to the underlying purpose of constitutional rights is reflected in the jurisprudence of the South African Constitutional Court. In *Khumalo* the court only employed the *right* to freedom of expression for purposes of ‘hooking’ the dispute onto section 8(2). Once this procedural threshold was met, the court switched to balancing the *values* of freedom of expression against human dignity.⁹⁹ The *Khumalo* court employed these values that underlie constitutional rights to determine what constitutes the public and legal convictions of the community so as to inform and crystallise the requirement of wrongfulness. This method of legal reasoning is no different to the law-making process followed in *Barkhuizen*. As discussed above, the *Barkhuizen* court merely determined the rationales for guaranteeing the right to access courts in a constitutional democracy (which would normally inform the scope of the right) and equated these rationales with constitutional values. Constitutional values and rights will therefore mimic each other. Whether expressed as a constitutional right or a constitutional value, these norms are constitutional principles that aim to be realised to the fullest possible extent.

⁹⁶ *Lüth* 7 (n 94).

⁹⁷ Möller (n 10) 37.

⁹⁸ *ibid* 35–37.

⁹⁹ See *Khumalo* (n 13) para 25 (emphasis added):

[A]lthough freedom of expression is fundamental to our democratic society, it is not a paramount *value*. It must be considered in the context of the other values enshrined in our Constitution. In particular, the *values* of human dignity, freedom and equality.

The *Khumalo* court also mentioned at paragraph 28 that the law of defamation must strike a balance between freedom of expression and ‘the value of human dignity’.

This point can be amplified. When courts adopt value-based approaches they tend to emphasise that these values are not free-floating ideas which are cherry-picked and tweaked to match the idiosyncratic views of each judges. The South African Constitutional Court recognises the Constitution as encompassing an ‘*objective* normative value system’. That term was copied from the writings of the German Federal Constitutional Court. However, in response to criticisms that values invited moral and subjective decision-making, the German Constitutional Court replaced the phrase ‘objective normative values’ with ‘objective dimensions’ of rights. It did so to underscore the point that values-based reasoning is not constructed on individual values and moral readings but rather stem from the objective and discernable criteria that underpin the justifications and purpose of constitutional provisions.¹⁰⁰

The only defensible difference between these two judgments is that the court was unable to find a strong enough hook in *Barkhuizen* to peg the matter onto section 8(2). A conceivable explanation is that the court’s assessment of the duties contemplated by the right to have access to courts is not of a nature to bind a non-state actor directly. However, as this chapter argues, this matters little. Indeed, the conclusion that there is no difference between these theoretically distinct models is reinforced by the observation that the court has not only removed the terms of ‘direct’ and ‘indirect’ application from its vocabulary in recent years, but also discusses sections 8 and 39(2) together as a unified framework as opposed to separate and distinct streams of horizontality.¹⁰¹

One must of course be conscious of the warning not to interpret constitutional provisions in way that makes another provision redundant.¹⁰² Sections 8(2) and 39(2) do start at different positions, and their respective applications may at times be triggered by different stimuli. Perhaps, in the future, the courts may come to interpret the provisions to serve different purposes which no doubt will affect the scope of their respective applications on private law. Scholars have engaged with the difference between these two sections, debating as to whether section 8 or section 39(2) is the start point, the different doctrinal justifications on which they are premised, and which of the two

¹⁰⁰ See Möller (n 10) 11.

¹⁰¹ See *AllPay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 (4) SA 179 (CC); *Botha* (n 76); *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC); *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC); *Governing Body of the Juma Musjid Primary School v Essay* 2011 (8) BCLR 761 (CC).

¹⁰² *Khumalo* (n 13) para 31.

provisions afford a wider scope of application.¹⁰³ In fact, untangling sections 8 and 39(2) from one another has become the most dominant issue debated in the horizontal application literature. So much of this debate has taken place in the nebulous clouds of ‘direct’ and ‘indirect’ application that it has completely smothered analysis of what the courts are expected to accomplish with these provisions. To the extent these provisions are doing the same thing, it must be underscored that that the horizontal application provisions in South African Constitution are products of an intense political compromise amongst the negotiating parties, which is an outcome that was significantly influenced by the inability to anticipate fully how rights would come to bind private individuals and entities.¹⁰⁴ The drafting history of sections 8 and 39(2) is discussed in chapter two, but, to recapitulate, there is no evidence to conclude that the parties intended these two provisions to create distinct and parallel pathways. There is little to gain in squabbling about their differences as it does not advance the debate.

It is far more important to ensure that the reason for entrenching horizontality into the South African Constitution is realised. The South African Constitution does not prescribe to a philosophy of negative liberties. It recognises equality and the advancement of human dignity, and requires an array of affirmative measures so as to ensure that certain interests are not only protected from invasion but are also actively realised. It is a belief that was held by some at the time of drafting the Constitution, which has since grown within the political culture of South Africa: private actors are just as capable of infringing constitutional rights and their actions must be controlled in order to realise the broader objectives of the South African Constitution. Sections 8 and 39(2) both aim to give effect to this goal. The South African courts, unlike their counterparts from around the world, do not need to engage in conceptual gymnastics to create doctrinal models that justify and explain the application of rights to private individuals and entities. The South African Constitution has already done this heavy lifting as it affirms that applicable constitutional right norms apply to private law. The only question is the extent of the application, which distils to how clashing right norms are resolved. The answer to this question is not found in distinctions between rights and values.

¹⁰³ For examples of this debate, see François du Bois, ‘Contractual Obligation and the Journey from Natural Law to Constitutional Law’ in Michael Bishop and Alistair Price (eds), *A Transformative Justice* (Juta 2015) 281, 287–99; Woolman (n 89) 777–78.

¹⁰⁴ See James Fowkes, *Building the Constitution* (CUP 2016) 102–03; Richard Spitz, *The Politics of Transition* (Hart 2000) 268–85.

5 The state's duty to protect rights: section 7(2) of the Constitution

There is an additional method through which constitutional rights impose obligations upon private individuals and entities: the duty upon the state to protect rights between private individuals and entities. In South Africa, this argument is grounded in section 7(2) of the Constitution. The provision obliges the state to protect the rights in the Bill of Rights.¹⁰⁵ In accordance with this duty, and where appropriate, the state is mandated with an affirmative obligation to take measures including the promulgation of legislation to ensure that personal interests protected by a constitutional right are not impaired by the actions of private individuals and entities.¹⁰⁶ The scope of the duty to protect depends on the constitutional right implicated, but, as a general rule, the state violates a constitutional right whenever it fails to enact or enforce laws or other measures that are capable of providing adequate protection to the interests safeguarded by the right against the actions of private individuals and entities.¹⁰⁷ Though this obligation resides on the legislature to promulgate laws, the court may remedy any failure of the state by amending legislative schemes. The outcome of this judicial-law making task is a familiar one. The court's substitution for legislative action also takes on the form of the balancing process.

*The case of Jaftha v Schoeman*¹⁰⁸

Though it was not argued as a section 7(2) case, the *Jaftha* judgment can be viewed through the prism of the duty to protect. The matter investigated whether a statutory provision authorising a writ of execution against a person's home in order to satisfy a private debt was unconstitutional for failing to comply with the right to have access to adequate housing as safeguarded by section 26(1) of the Constitution. The challenged statutory provision mandated an administrative judicial clerk to issue a writ of execution for the immovable property of a judgment creditor in situations where the movable

¹⁰⁵ Constitution s 7(2): 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

¹⁰⁶ *Glenister v President of the Republic* 2011 (3) SA 347 (CC) para 105; *Carmichele* (n 38) para 44; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 20.

¹⁰⁷ *Head of Department, Department of Education v Welkom High School* 2014 (2) SA 228 (CC) paras 85–86 (the duty upon the state to protect rights must comply with the rule of law; that is, protective actions must be sourced within a legal provision and the executive branch of government may not implement measures for which there is no authority in law even if such measures are benevolent).

¹⁰⁸ 2005 (2) SA 140 (CC). This judgment is read as an example of judicial law-making because the state opposed the application as well as the remedy ordered.

property of the creditor proves insufficient to cover the debt. The writ was issued automatically, without any discretion, and without any judicial oversight. The concern with executing a writ against immovable property is the possibility that the loss of home ownership translates to the loss of a place to reside; a possibility that no doubt increases in likelihood where the creditor is unable to secure alternative housing due to financial constraints and the unavailability of state housing.

The court interpreted the housing right broadly, and held that that ‘any measure which permits a person to be deprived of existing access to adequate housing’ limits the right.¹⁰⁹ The impugned debt-enforcement provision was found to be such a measure. The court turned to section 36, and investigated whether the rights limitation analysis could save the legislative provision. Here, the court found that the right to have access to a home was not the only interest deemed worthy of protection and must be weighed against countervailing interests. On the other side of the equation lay a conflicting private and government interest, namely the need to ensure that commercial undertakings and other debts are enforced in an efficient manner. Debt enforcement is one of the means through which the state ensures a market economy, and it further secures the financial interests of the judgment debtor. The court ultimately found that although the debt-enforcement provision served a legitimate purpose, it was overbroad in its reach given that it permitted execution in situations where it would be considered highly disproportionate. The provision was consequently declared unconstitutional.

The court was invited to prohibit the enforcement of debts through writs of execution against homes if the debt was below a certain limit. The court declined the invitation, citing the need to protect creditors and the illogical outcome that would flow if creditors were forever prevented from recovering debts from owners of these excluded properties.¹¹⁰ On account of the potential clash of interests, the court remedied the statutory provision on behalf of the legislature by ‘reading in’ a flexible and fact-dependent balancing process in the statutory provision. No longer may a clerk issue a writ of execution for immovable property. To accommodate conflicting interests, only ‘a court, after consideration of all relevant circumstances, may order execution’ against immovable property.¹¹¹ The court prescribed the following non-exhaustive list that lower

¹⁰⁹ *Jaftha* (n 108) para 34.

¹¹⁰ *ibid* para 51.

¹¹¹ *ibid* para 64. For additional examples of flexible process in the context of the property and access to housing, see *City of Johannesburg v Blue Moonlight Properties* 2012 (2) SA 104 (CC) para 100 (‘a

courts must consider in the application of the process: the circumstances in which the debt was incurred; any attempts to pay off the debt; the relative financial situation of the parties; the amount of the debt; whether the debtor is employed or has other sources of income to pay the debt; and any other factor relevant to the particular facts of the case.¹¹²

6 Reasons for adopting the flexible balancing process

Three core reasons explain the attraction to the balancing process. The first one is principled, the second is pragmatic, and the last is one of constitutional efficacy.

6.1 *Conflicting principles require balancing*

Judicial balancing is a necessary component of constitutional rights adjudication because no feasible alternatives are available. Robert Alexy convincingly argues that balancing is an unavoidable constitutional process because there is simply ‘no other rational way’ to justify the limitations of rights even though the balancing process leads to many other problems.¹¹³ Alternative options, he suggests, will produce the undesirable result of creating absolute rights from which no derogation is permitted. This reason is identifiable in the Constitutional Court’s case law. As *Khumalo, Barkhuizen* and *Jaftha* demonstrate, constitutional rights are rarely characterised as absolute guarantees and courts tend to avoid establishing hierarchies of rights that permit one right to trump another. In the abstract, rights have equal normative force.¹¹⁴ It is only through the balancing of conflicting rights in accordance with the specific facts and circumstances of

degree of patience should be reasonably expected’ of a private landowner to provide the state with an opportunity to comply with an order to provide emergency housing); *Port Elizabeth Municipality* (n 4) paras 18, 38 (in the context of eviction legislation, courts must seek to reconcile property and housing needs in a ‘close analysis of the actual specifics of each case’); *Daniels* (n 11) para 51 (in the context of security of tenure legislation, whether a landowner is imposed with a positive socio-economic rights obligation ‘depends on a variety of considerations’). See also *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 76 (in the context of a statute that denies unregistered credit providers the right to restitution for money lent, the failure of the statute to provide courts with a discretion to distinguish between credit providers who intentionally exploit consumers and those that ignorantly fail to register — as, for example, they were merely lending to a friend — is a disproportionate means to achieve the purpose of the statutory framework; such a provision is an unjustifiable deprivation of the property right).

¹¹² *Jaftha* (n 108) para 60.

¹¹³ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 74; Robert Alexy, ‘Balancing, Constitutional Review, and Representation’ (2005) 3 *ICON* 572, 573.

¹¹⁴ See *S v Mamabolo* 2001 (3) SA 409 (CC) para 41.

the case that the court is able to ensure that interests protected by conflicting rights are afforded adequate protection.

Another undesirable result may ensue if judicial balancing is not undertaken. Instead of providing an elevated status to one right in the abstract, the alternative option is to adopt a minimalistic approach to the protection of constitutional rights. This approach will undermine the very purpose of entrenching a justiciable human rights framework. In the context of the vertical application of rights, the legislature will enjoy an unmonitored power to pick the constitutional interest to favour at the expense of other interests if the courts opt not to undertake an evaluation of competing interests.¹¹⁵ This potential shortfall is also applicable to horizontal application matters. The judiciary is responsible for the development of the common law. If the court neither balances nor provides a right with an elevated status, the result will merely be that private law remains unchanged (with the tacit approval of the legislature) even though its current application unduly encroaches upon an interest protected by a constitutional right.

Ultimately, the choice is not whether or not to prescribe a balancing test. It is rather what type of balancing exercise to conduct. The three decisions discussed above are examples of, what we can call, process-based balancing. Instead of creating fixed rules applicable to all scenarios falling within a defined ambit, we rather let the complexities and nuances of the case influence the outcome.

In contrast to process-based balancing, we can identify outcome-based balancing.¹¹⁶ This type of balancing exercise creates rigid rules that yield certain results. *New York Times v Sullivan* is an example of outcome-based balancing. Ignoring the particulars of individual cases, the United States' Supreme Court interpreted their Constitution to require freedom of speech to (nearly) always trump the reputational interests of public officials.¹¹⁷ This is also a form of balancing based on the rules of interpretation and policy concerns of that society (i.e. political speech must be robust to ensure a vibrant democracy, and the personal interests of public officials must always give way to achieve this aim). We should be cautious before suggesting that outcome-based balancing is problem-free, as balancing in the abstract can lead to arbitrary and

¹¹⁵ See Aharon Barak, *Proportionality* (CUP 2012) 493–502; Möller (n 10) 131–33. Compare Grégoire Webber, *The Negotiable Constitution* (CUP 2009) 147–180.

¹¹⁶ Although process- and outcome-based balancing is presented as a binary choice, it is more accurate to view these two options along a range. See chap 8, sec 2.

¹¹⁷ *Sullivan* (n 25).

unpredictable decision-making. At times there can be strong disagreement and uncertainty on how to weigh interests in the abstract. The decision of *Sullivan* remains instructive here. Scholars continue to debate to this day whether the balance struck by the US Supreme Court was correct. Some argue that the media ought to have been given absolute protection, and others hold that the reputation of public officials who are attacked with false statements deserve stronger legal protection.¹¹⁸ Outcome-based balancing may produce more certain results, but the decision-making process of how to weigh interests in the abstract is open to criticism. It is impossible to predict all future scenarios, and the mechanisms employed to weigh competing rights in the abstract are at times both contested and opaque. Since *Sullivan*, the Supreme Court has struggled to define who actually constitutes a public figure.¹¹⁹ The ambiguity in their definition is attributable to the fact that the court remains unable to strike a clear balance between the right to free speech and a state's interest in protecting reputation.¹²⁰ Another aspect of the seemingly fixed *Sullivan* test introduces judicial discretion, and, as a result, some uncertainty. The decision solidified the 'actual malice' standard in US defamation law. In doing so, the US Supreme Court pivoted the focus of public-figure defamation suits away from the more objective criteria of asserting whether the statement is true or false to a more subjective enquiry into the degree of negligence displayed by the publisher at the time of publishing.¹²¹ This negligence-based enquiry echoes *Khumalo* (the focus is on the intentions and actions of the media defendant, although the United States adopts a considerably higher threshold). To recall *Khumalo*, liability will not flow if upon consideration of all the circumstances it was 'reasonable to publish the facts in the particular way and at the particular time.'

¹¹⁸ Compare Richard Epstein, 'Was *New York Times v. Sullivan* Wrong?' (1986) 53 *University of Chicago Law Review* 782, 795–818; Frederick Schauer, 'Uncoupling Free Speech' (1992) 92 *CLR* 1321.

¹¹⁹ *Gertz v Robert Welch* (1974) 418 US 323. On the difficulty of identifying whether a person constitutes a public figure, see Lee Levine, 'Editorial Function and the *Gertz* Public Figure Standard' (1978) 87 *Yale Law Journal* 1723. See also remarks by Chief Justice Earl Warren in *Curtis Publishing v Butts* (1967) 388 US 130, at 136 ('distinctions between government and private sectors are blurred'). Although the *Sullivan* decision used the term 'public official', later judgments adopted the phrase 'public figure'.

¹²⁰ Levine (n 119) 1723–75.

¹²¹ Randall Bezanson, 'Libel Law and the Realities of Litigation' (1985) 71 *Iowa Law Review* 226, 229–30.

6.2 *A pragmatic approach*

The contextual balancing of rights allows for a flexible, reflective, and gradual process through which constitutional rights and their underlying values influence the development of private law. The horizontal application is a new and underdeveloped area of constitutional law, and the exact scope of application can be determined neither in the abstract nor from previous experiences alone.¹²² The virtue of endorsing the contextual balancing process as the primary means to resolve constitutional conflicts allows courts to refrain from prescribing fixed and untested rules for a complex and ever-changing society. Rather, constitutional courts need only concern themselves with the specific matter at hand. In essence, balancing tests permit courts considerable leeway to adjust its jurisprudence when a future dispute warrants a different outcome. It must be added here that judges are often forced to adopt flexible procedures because, unlike the legislature, they cannot prescribe arbitrary distinctions for purposes of convenience and practicality. In *Barkhuizen*, for instance, the court was not prepared to propose an exact time period for a time bar clause in insurance contracts despite the fact that it is not uncommon for the legislature to set fixed prescription periods.

This characteristic of the balancing process is subject to extensive criticism. It is argued that a flexible and contextual ‘case by case’ decision-making process creates too much uncertainty in the law. Jurists may easily agree on the need to protect constitutional rights and values, but may come to disagree on which interest to sacrifice when presented with a particular case. The volume of dissenting opinions witnessed in South African constitutional rights adjudication stands testament to the fact that reaching consensus on the outcome of the balancing process is difficult and not always possible.¹²³ An additional drawback to the ‘fact-sensitive and contextual manner’¹²⁴ approach is that it does not easily allow for the crystallisation of rules. Commentators may at times be left unsure of how a future case will be decided. Judges investigating the same set of facts

¹²² *Daniels* (n 11) para 41, quoting Ian Currie and Johan de Waal, *The Bill of Rights Handbook* (6ed, Juta 2013) 50.

¹²³ See *Le Roux* (n 16); *Barkhuizen* (n 53); *Cool Ideas* (n 66); *Paulsen* (n 46). These cases produced differing opinions despite most judges agreeing on the constitutional principles that ought to be balanced.

¹²⁴ *Laugh It Off Promotions v South African Breweries* 2006 (1) SA 144 (CC) para 89. For reasons better explained in chap 8 sec 2, it is unfair to characterise the balancing process as completely fact sensitive. There are many attempts to qualify judicial discretion with objective criteria to ensure that the outcome does not depend on individual views. For example, see the judgments of Sachs J in *Barkhuizen* (n 53) and Froneman J in *Cool Ideas* (n 66).

will most certainly differ on what constitutes the exact parameters of a ‘reasonable publication’ or a ‘fair and adequate opportunity to seek judicial redress’.¹²⁵ This concern stems from the principle of legality, which is a central component of the rule of law.¹²⁶ Rules must be sufficiently clear, and individuals must be able to predict results.¹²⁷ The need for legal consistency pulls towards fixed rules.

The concern over the certainty and efficiency of law is a fair one, but we should not take this critique too far. The balancing process does not rip up existing law, and claims that the process is an amorphous exercise free from structure are exaggerated. As the cases discussed highlight, the process is undertaken within an established and detailed legal framework. In addition to the broad factors prescribed, the balancing process gains structure and a degree of predictable application from the law into which it is incorporated. The process benefits from procedural rules such as evidence and onus of proof, as well as the more substantive rules and principles of private law that surround and inform the decision-making process. Plus, the application of general principles to individual disputes leads over time to the crystallisation of rules. As Robert Alexy highlights, the judicial practice of identifying the conditions under which one constitutional principle takes precedence over another is the law-making process through which rules are eventually crystallised.¹²⁸ In the interim, and while these rules are still forming, we must not forget that adjudicative techniques that result in a divergence of opinions have never been an innate problem in that a degree of flexibility is not considered destructive to the rule of law. Flexible and context-specific reasoning is seen across all fields of law. They are in both the common law and legislation. It is clear from the court’s jurisprudence — as well as legislative policy, which is discussed in Part C of

¹²⁵ For support of the view that the law of contract should caution against incorporating vague notions of fairness and good faith as a substantive defence because it would lead to inconstant application and the frustration of parties’ expectations, see *Brisley* (n 58) para 23; *Potgieter* (n 79) paras 34–36; *Standard Bank v Saunderson* 2006 (9) BCLR 1022 (SCA) para 14. See also the academic writing of Supreme Court of Appeal judges, FDJ Brand, ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ (2009) 126 *SALJ* 71, 77; Carole Lewis, ‘The Uneven Journey to Uncertainty in Contract’ (2013) 76 *THRHR* 80; Malcolm Wallis, ‘The Common Law’s Cool Ideas for Dealing with Ms Hubbard’ (2015) 132 *SALJ* 940, 942. Compare *Combined Developers* (n 73) paras 37–41.

¹²⁶ *Bredenkamp* (n 59) para 39.

¹²⁷ *Mighty Solutions* (n 43) para 37. In the context of legislation, see *Opperman* (n 111) paras 46–48. See also *Slabbert v MEC for Health and Social Development of Gauteng* [2016] ZASCA 157, unreported judgment, 3 October 2016 paras 16–17 (the courts have no general discretion to nullify a settlement agreement; certainty and finality are also important considerations even if a litigating party acted under a misconception).

¹²⁸ Alexy, *A Theory of Constitutional Rights* (n 113) 53–54.

the thesis — that whatever may be lost from not setting strictly defined legal duties for purposes of securing legal certainty is set off against the benefits that are gained from adopting flexible balancing processes to resolve constitutional conflicts.

Moreover, the task of balancing is not a new judicial function. It fits neatly within the tradition of the South African common law. Our earliest law reports document that the courts have always employed differing sorts of context-specific balancing exercises to develop the law.¹²⁹ New causes of actions or defences within the common law are usually introduced in a manner that rejects fixed rules, showing rather a strong preference for open-textured rules that allow future cases to test and gradually craft the parameters of new common law rules. A pertinent example of this occurrence was the introduction of the public policy test in contract law (which happened prior to the enactment of the Constitution).¹³⁰ Furthermore, the ‘reasonable publication’ defence developed from within the common law of defamation and was only later certified as compliant with the Constitution.¹³¹

Two prominent examples from the law of delict further illustrate this point. In *Minister van Polisie v Ewels*, the Appellate Division settled a longstanding dispute when it held that liability could indeed flow from a failure to act.¹³² The apex court declined to prescribe a general rule as to when liability would result, merely stating that the ‘legal convictions of the community’ must inform whether a particular omission given the facts of the specific case is considered as wrongful. At the time of the judgment, the ruling was criticised in certain quarters for introducing much uncertainty and ‘palm-tree justice’ into the law.¹³³ Today, however, the *Ewels* precedent is a firmly established principle, and the criticisms levelled against the decision proved largely exaggerated. Also, in

¹²⁹ *Du Plessis* (n 45) para 83. See Mark Tushnet, ‘The Issue of State Action/Horizontal Effect in Comparative Constitutional Law’ (2003) 1 *ICON* 79, 95–97 (horizontal application does not raise any distinctive concerns for the separation of powers, as common law courts have always enjoyed the power to make law).

¹³⁰ See *Sasfin* (n 61) at 9F–G. See also *Botha* (n 61) at 783J.

¹³¹ See *Bogoshi* (n 31). After surveying other jurisdictions around the globe, and noting that the law of defamation must strike a balance between the right to reputation and freedom of expression, the SCA concluded that the requirement of ‘wrongfulness’ should crystallise the defence of ‘reasonable publication’ in South African law.

¹³² 1975 (3) SA 590 (A). Prior to this decision, the prevailing view was that liability for an omission could only flow if the omission was connected to a prior positive act. See *Cape Town Municipality v Paine* 1923 AD 207, at 217; *Halliwel v Johannesburg Municipal Council* 1912 AD 659, at 670–72.

¹³³ See PQR Boberg, *The Law of Delict, Volume I* (Juta 1984) 213–14.

Administrateur, Natal v Trust Bank van Afrika, the Appellate Division recognised a claim for pure economic loss caused by false statements negligently made.¹³⁴ However, to prevent limitless liability, the court held that liability would not arise if the defendant exercised ‘reasonable care’ in determining the correctness of the statement.¹³⁵ That enquiry depends on the particular circumstances of each case. Each of the decisions left it to future disputes to refine the scope of application. The position of the courts has therefore always been that ‘our law is flexible enough to adapt to the needs of the times’.¹³⁶ Judge Michael Corbett sums up this position. The future Chief Justice wrote with his academic pen:

In the last resort the judge will often be required to perform a balancing act between two competing values, each in itself a worthy and desirable one. It may be freedom of the press versus the right of the individual not to be defamed; or the sanctity of a contract versus the reluctance to uphold a contract which offends against public policy; or the free enterprise system versus the need to restrain dishonest or unfair competition [...]. And the balance which is struck must accord with society’s notions of what justice demands. It is a fascinating but daunting task; and one which the courts are often called upon to perform. And it is a process to which our Roman-Dutch common law, based as it is on broad principle, lends itself particularly well.¹³⁷

6.3 *Promotes a core constitutional objective*

Context-dependent balancing is an attractive framework because it has the propensity to promote accountability in decision-making. In vertical application matters, the balancing exercise requires the state to provide sound justification that is based on evidence and free from unnecessary political rhetoric on the importance of why a social project should be favoured above a constitutional right.¹³⁸ On this view of the balancing exercise, we do not prize balancing because it contains a mathematical formula to resolve conflict between rights.¹³⁹ Rather, the virtue of balancing is that it serves as an effective

¹³⁴ 1979 (3) SA 824 (A).

¹³⁵ *ibid* at 833A.

¹³⁶ *Argus Printing and Publishing v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 590G–H.

¹³⁷ Michael Corbett, ‘Aspects of the Role of Policy in the Evolution of Our Common Law’ (1987) 104 *SALJ* 52, 68–69

¹³⁸ See *S v Makwanyane* 1995 (3) SA 391 (CC) para 156.

¹³⁹ See *Maphango* (CC) (n 101) para 151 (‘Interpretation and application of the law under the Constitution is never a mechanical application of rules; it always involves a value judgment. Our Constitution and law are infused with moral values. The days of denying the value-laden content of the law are long gone’).

instrument to realise an important constitutional objective: the achievement of a ‘culture of justification’.¹⁴⁰ The legality of government decision-making is based not only on the observance of procedural requirements but is also contingent on the quality of the reasons provided for those decisions.¹⁴¹ This rationale for the balancing process resonates in the court’s horizontality jurisprudence. The exercise of private power must similarly be interrogated and justified whenever it infringes upon a constitutionally protected interest. For example, the ‘reasonable publication’ defence requires a media defendant to justify on the specific facts of the case as to why legal liability ought not to ensue from their actions despite the media’s decision to encroach on another’s dignity or privacy right. The law of contract, with its increasing focus on good faith, may also, and at least in some instances, require contracting parties to justify their actions and motives before a court permits contractual performance that encroaches upon an interest protected by a constitutional right.

The need to justify the exercise of private power does however reveal a deficiency in the jurisprudence. Chapter three demonstrated that constitutional law has been considerably more successful in translating the principle of public accountability into a workable framework. The section 36 rights-limitation analysis is structured to facilitate the judicial evaluation of state actions and motives. The law has yet to develop a comparable framework for horizontal application disputes, which is partly a symptom of a much larger problem. Jürgen Habermas cautions that the judicial balancing of competing interests will in all likelihood take place ‘unreflectively’ and ‘according to the customary standards and hierarchies of society’.¹⁴² The fact that balancing takes place in line with certain established standards is of course not an innate problem because all societies must be premised on certain organising norms. However, this potentially conservative effect of balancing is troublesome when it is used in a country, like South Africa, seeking to undergo a constitutional revolution that requires a reassessment of the underlying principles and structures of private law derived from the pre-revolution era.¹⁴³ There is a strong argument that this risk has materialised in the context of the South

¹⁴⁰ Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 31, 32. See Aharon Barak, *Proportionality* (CUP 2012) 458–59.

¹⁴¹ See Stephen Gardbaum, ‘Proportionality and Democratic Constitutionalism’ in Grant Huscroft, and others (eds), *Proportionality and the Rule of Law* (CUP 2014) 259, 261–62.

¹⁴² Jürgen Habermas, *Between Facts and Norms* (MIT Press, 1996) 259.

¹⁴³ See Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 146, 168.

Africa private law.¹⁴⁴ Scholars have argued that there are instances where courts have merely conducted the balancing exercise in terms of the more traditional standards and hierarchies inherited from the Roman-Dutch common law, which is largely premised on classical liberal notions of autonomy and not pursuant to the more socially egalitarian mandate of the South African Constitution.¹⁴⁵ In sum, the fact that we have yet to develop a more structured balancing analysis in horizontal application disputes is due to the fact that the jurisprudence remains somewhat ambiguous and scattered on the core reason for horizontality. The next chapter explains how the core purpose of the horizontal application of rights — which is the control of private power — begins the process of adding more structure and predictability to the balancing process.

¹⁴⁴ See Spitz (n 104) 268–85.

¹⁴⁵ See Sandra Liebenberg, *Socio-Economic Rights* (Juta 2010) 372–74; Michael Dafele, ‘Curbing the Constitutional Development of the Contract Law (2014) 131 *South African Law Journal* 271; Frank Michelman, ‘Constitutions and the Public/Private Divide’ in Michael Rosenfeld and Andr  s Saj  , *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 298, 312.

CONTROLLING PRIVATE POWER

This chapter explains how the ‘balancing process’ facilitates the core objective of horizontality, which is to control the exercise of private power.

1 Two characteristics of right norms

Constitutional right norms must assume two characteristics to make the judicial balancing process functional.

The scope of right norms must be inflated. It is a trite principle of our constitutional democracy that all subordinate sources of law must comply with the Constitution.¹ This includes private law.² The Constitution does not merely flow through the vessels of private law, developing only to the extent that the internal logic and rules of private law can absorb constitutional right norms. Subordinate private law cannot constrain the full application of the Constitution. The preferred view is that of the Constitution imposing an external pressure on private law. The Constitution remoulds private law so as to allow constitutional right norms to flow through it.

But this feature introduces a potential problem. As explained in chapter three, unlike the legislature, courts cannot select their own policy objectives to champion in

¹ *Pharmaceutical Manufacturers Association* 2000 (2) SA 674 (CC) para 44.

² *Botha v Rich* 2014 (4) SA 124 (CC) para 24; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 15; *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) paras 46, 148; *Alexkor v Richtersveld Community* 2004 (5) SA 460 (CC) para 51.

horizontal application disputes.³ The courts must instead identify a legal justification grounded in the Constitution for limiting one right norm to safeguard another. And, to this end, it would seem that the only viable solution is to inflate the scope of rights in order to ensure that all possible legal interests protected in private law are also afforded constitutional protection (even if it is only a minimal amount of protection).⁴ If this were not the case, parts of private law would be nullified automatically if it were to clash with a protected constitutional right. Consider the *Khumalo* judgment.⁵ If freedom of expression was constitutionally protected and human dignity was not, the courts would have no choice but to favour the interests of the media in all disputes. It bears noting that the pressing need to inflate the scope of rights offers an explanation as to why constitutional values are popular tools of legal reasoning in horizontal application adjudication. Values allow courts to protect all those interests that are not expressly or adequately protected within the often-stricter boundaries of constitutional rights.⁶ In the law of contract, for example, the courts often cite contractual autonomy and legal certainty as principles that are embedded or derived from the Constitution. This is despite the fact that there are no constitutional provisions that expressly articulate these principles.

The inflation of right norms may solve one problem, but it amplifies another. Rights inflation drastically increases the number of legal interests that may clash, which, in turn, intensifies the need to locate an organising legal justification for determining when to a limit one right norm in order to secure another. The second characteristic begins solving this problem.

Right norms must be viewed as internally conflicting. The orthodox view of constitutional rights is premised on a relationship of imbalance. All private individuals and entities are afforded rights in order to protect certain fundamental interests against the

³ Chap 3, sec 2.

⁴ See *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) para 70.

⁵ *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

⁶ Another possible reason for rights-inflation is that concerns over the separation of powers do not feature prominently in horizontal application disputes. For example, see Alison Young, 'Human Rights, Horizontality and the Public/Private Divide' (2009) 2 *UCL Human Rights Review* 159, 179–84. The author notes that under English law the courts have applied human rights more expansively in private law (as compared to when courts review legislation) partly due to the perception that courts do not infringing upon Parliament's law-making territory in horizontal disputes.

otherwise coercive power of the state. In this vertical relationship of power, the state is always the duty-bearer and private individuals and entities are always the right-recipients.

Horizontal application forces right norms to operate somewhat differently. We are now dealing with two right holders. And at least one of the right holders — and sometimes both — invokes their constitutional right in order to exercise a power over another. In *Barkhuizen*, for example, the court effectively held that the two transacting parties were entitled to exercise their constitutionally guaranteed freedom to contract, and, in doing so, were permitted to negotiate corresponding rights and duties over one another. Constitutional rights norms therefore safeguard the exercise of private power. But that causes a tension: these constitutionally protected private powers may lead to a situation where private individuals and entities unduly encroach upon the rights of others. This is what happened in *Barkhuizen*. The freedom to contract led to the curtailment of another constitutional right norm. Constitutional right norms must therefore be viewed as internally conflicting in horizontal application disputes. On the one hand, rights norms aim to secure an individual freedom (from state and non-state actors). On the other hand, however, right norms need to be applied in a manner that ensures that the legal powers that derive from a constitutionally guaranteed freedom is not exercised in a manner that unduly infringes on another's right.

In other words, constitutional right norms come into conflict whenever one norm is interpreted to afford the right holder a legal power, which, in the exercise thereof, results in the impairment of another's constitutional right. The purpose of applying constitutional right norms to private legal relationships is therefore to impose limits on an otherwise constitutionally protected power so as to ensure such private power is not exercised in a manner that unduly and without adequate justification encroaches upon the rights of another. The control of private power — which is sourced in and protected by the Constitution — is therefore the primary legal justification for limiting constitutional rights in private litigation. Therefore, in addition to balancing rights against one another, the judicial balancing process must also balance the internal conflict within right norms (the need to protect a freedom v the need ensure that the exercise of that freedom does not unduly limit another's right). This chapter explains how this task is performed.

2 A bad metaphor

It is well rehearsed elsewhere that the image of constitutional rights applying *horizontally* is a metaphor that was initially introduced as a means to differentiate the application of constitutional rights between non-state actors from the more orthodox ‘vertical’ application of rights between state and individual.⁷ The metaphor is a bad one. The image fails to explain the case law correctly. More problematically, the metaphor risks obfuscating and perhaps even crippling the primary purpose of a human rights framework that requires private individuals and entities to be bound by applicable constitutional rights.

The entrenchment of human rights into national constitutions originally emerged from political philosophy as a means to provide legal protection for certain individual interests against the otherwise coercive power of the state. Literature labelled this the vertical application of rights on account of the inherent nature of the legal relationship between the state and its populace. The state exercises an unequal and asymmetrical level of power and control over all private individuals and entities that fall under its command. This subordinate relationship premised on authority permits the state to command both the allocation of resources in society and the behaviour of individuals. In contrast to this vertical relationship of power, theory on the horizontal application of rights seeks to explain the method through which constitutional rights and values are interpreted to create obligations for private individuals and entities. In the event of any doubt, let it be reiterated that this legal phenomenon is dubbed ‘horizontal’ because it denotes the supposed equal footing in the nature of the legal relationship between all private individuals and entities.

The notion that private individuals and entities enjoy parity of power among themselves stems from the foundational principles of private law which all too often assumes that all non-state actors have the ability to interact and trade as equals.⁸ It is often thought that there are no intrinsically coercive power structures in the realm of

⁷ The origin of the term ‘horizontal application’ is traced to German legal theory. In the seminal decision of *Lüth* (1958) 7 BVerfGE 198, the Federal Constitutional Court of Germany developed the notion of ‘*mittelbare drittwirkung*’ (indirect third party effect) to distinguish an earlier Federal Labour Court decision that permitted ‘*unmittelbare Drittwirkung*’ (direct third party effect) of certain rights in the Basic Law. On the unfortunate use of the horizontality metaphor in South Africa, see Johan Froneman, ‘The Horizontal Application of Human Rights Norms’ (2007) 1 *Speculum Juris* 13, 13.

⁸ Sandra Liebenberg, ‘Socio-Economic Rights Beyond the Public-Private Law Divide’ in Malcolm Langford and others (eds), *Socio-Economic Rights in South Africa* (CUP 2014) 63, 64.

private law; a private individual or entity has neither the power to coerce others to reallocate their resources nor the power to direct the behaviour of others. Any form of economic coercion is created and permitted on account of voluntary choice (law of contract), wrongful conduct (law of delict), familial relations (law of family), or the receipt of an undue benefit (law of unjustified enrichment). Private power in the legal sense — more commonly termed legal capacity — is not equated to economic or political power.⁹ This view should of course not be exaggerated. Private law recognises that certain power dynamics in private relationships are unequal, and, in response, the law developed principles aimed at ensuring that the exercise of that power does not unjustly undermine legitimate private interests.¹⁰ Yet, the fact remains that we tend to view public law as a vertical relationship of unequal power and private law as a horizontal relationship of equal power.¹¹

The exact relationship between these two definitions of private power — that is, legal capacity and economic/political power — is debatable. Some argue that the neutral rules of the common law are completely indifferent to the economic and political power wielded by private individuals and entities.¹² Others suggest that there is an assumption that these powers are the same, or, at least, are at an acceptable level of equilibrium.¹³ Another school of thought submits that the neutral private law actively promotes the creation of hierarchies in society.¹⁴ Proponents of this view argue that the purpose of public law is to ensure that citizens are treated with parity (e.g. the right to vote). The purpose of private law, on the other hand, is not to create equality. To facilitate the progression of both society and individual development, the rules of the common law create neutral rules to allow people to position themselves within a society based on their own efforts, convictions, talents, and, yes, luck. Any society, so the argument proceeds, must be premised on certain economic and political hierarchies to facilitate economic development and even public debate.

⁹ Public power is usually called authority.

¹⁰ Froneman (n 7) 19–20.

¹¹ See François du Bois, ‘Private Law in the Age of Rights’ in Elspeth Reid and Daniel Visser (eds), *Private Law and Human Rights* (Edinburgh University Press 2013) 12, 14.

¹² See Gramme Orr, ‘Private Association and Public Brand’ (2014) 17 *Critical Review of International Social and Political Philosophy* at 332, 337

¹³ See Dikgang Moseneke, ‘Transformative Constitutionalism’ (2009) 20 *SLR* 3, 9–11.

¹⁴ See Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (De Gruyter 2014) 6–7.

Social theory — and, of course, everyday reality — proves this legal fiction of equal power to be a fallacy. Definitions on what precisely constitutes ‘power’ are numerous and remain contested across the fields of the social sciences.¹⁵ There is no need to resolve this on-going debate for our purposes. But to establish a working definition, we can take comfort in the observation that the mainstream social theories on power converge on the notion that power is exercised by an entity whenever it enjoys the ability to control limited resources, and, as a consequence, the actions of another despite resistance in order to attain an intended result.¹⁶ Expressed in a more concise manner, power is the ability to exclude another against their choice from valued resources. We can tailor this definition for the purpose of applying it to constitutional rights. Power is exercised by an entity — whether state or otherwise — when it has the ability to control, and as a consequence limit, another’s access to a constitutionally protected resource.

The application of this definition of power reveals that private individuals and entities often do not enjoy parity of power in their relationship. Our social, commercial, and political interaction with others is predicated on hierarchical structures, which, in effect, permit certain private individuals and entities the power to exercise varying degrees of political or economic coercion over others. Consider an example of a bank issuing a home loan to an indigent individual. The bank exercises significant economic power over the individual given that the bank controls access to a basic resource. The bank enjoys an unrestricted election on whether or not to grant the loan given that the proceeds derived from the loan agreement will in all likelihood result in a negligible increase in profits. The indigent individual on the other hand has no similar option not to transact if he wishes to secure a basic human resource. Also, if the loan is granted, the bank continues to exercise considerable control over the individual’s access to housing in the event of default. This is not to say that structural hierarchies in society are automatically unjust and should not be permitted. It is merely to demonstrate that many

¹⁵ Steven Lukes, *Power: A Radical View* (Macmillan 1974) 7. For an overview of the various definitions of ‘power’ in social theory, see Mark Philp, ‘Power’ in Adam Kuper and Jessica Kuper (eds), *The Social Science Encyclopaedia* (3rd ed Routledge 2004) 788–94.

¹⁶ See Max Weber, *The Theory of Social and Economic Organisation* (AM Henderson and T Parsons tr. 1947) 152 (‘power is the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which the probability rests’, it is therefore the ability to control resources and people); Robert Dahl, ‘The Concept of Power’ (1957) 2:3 *Behavioural Science* 201, 202–03 (‘A has power over B to the extent that he can get B to do something he would not otherwise do’); Richard Emerson, ‘Power-Dependence Relations’ (1961) 27:1 *American Sociological Review* 31, 32 (‘power resides implicitly in the other’s dependency’, which means that the extent to which one person exercises power over another is dependent on the availability of alternative means to obtain a result).

private relationships are defined by a disparity in power relations, and that power imbalances can affect access to constitutionally protected resources. The media controls access to information, and employers control access to labour conditions.

It is for this reason that the *horizontality* metaphor is deceptive. Parity of power is a legal construct of private law. Of course, the fiction provides benefits including most notably the universal application of non-ambiguous and uniform rules. It allows the law to be clear, and the consequences of private actions to be certain. Yet an honest assessment of social relations reveals that the legal fiction of parity of power rarely corresponds to reality. In fact, as the next section shows, certain forms of power exercised in society by non-state entities are more akin to the ‘vertical’ power exercised by the state than what can be classified as ‘horizontal’ in nature. That is, private actors enjoy control over a constitutionally protected interest in a manner that prohibits the right holder from interacting on equal terms. This is then what this thesis reads to be the defining principle that guides the balancing process in horizontality disputes: the need to control unequal power relationships to ensure that those who wield political or economic power in society do not encroach without due justification upon access to constitutionally protected resources.¹⁷ To the extent that horizontality implies parity of power, we risk not recognising and implementing the purpose of entrenching a justiciable Bill of Rights that requires certain private individuals and entities to be burdened with constitutional obligations.

3 The power continuum

This section revisits the three Constitutional Court judgments analysed in the previous chapter. A deeper analysis shows that the judicial balancing process is performed pursuant to two main metrics (which correspond to the internal conflict within right norms).¹⁸ The first metric is the extent of the possible infringement upon another’s right. The more the exercise of that power impacts the core of a constitutional right norm, the

¹⁷ See generally Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 82 (the purpose of horizontal application and protective state duties is to ensure that individuals retain control over their actions and personal resources).

¹⁸ See *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 58 (there are two main considerations to determine whether a particular right binds a private individual or entity: the ‘intensity’ of the constitutional right and the ‘potential invasion’ of the right by a private individual or entity).

more there is a need to control the exercise of that power. The second metric is the amount of control a private individual or entity exercises over another's constitutionally protected resource. The more power that is wielded, the more there is a need to control the exercise of that power.

3.1 *Economic parity: Barkhuizen*

The best starting point is where the private law assumption of general economic parity is observed. The case of *Barkhuizen* is instructive here. Recall that in this matter the court held that a time bar clause is only constitutional if it permits a contracting party a 'fair and adequate' opportunity to approach a court for relief.

In conducting the balancing process, the majority judgment highlighted two important features that must be considered. The first is the relative bargaining power of the contracting parties (metric two).¹⁹ The need to control unequal positions of power in the law of contract, the court emphasised, is due to the reality of the social landscape of South Africa where many individuals are poor, illiterate and are generally uninformed of their legal rights.²⁰ The court went as far as to note that 'many people in this country conclude contracts without any bargaining power and without any understanding what they are agreeing to.'²¹

The second major consideration is the degree of encroachment into the constitutionally protected resource (metric one). The court held that any contractual provision that either outright denies access to a court for relief or any time bar clause that prescribes too short of a time period that prevents access to a court would be against public policy and therefore unenforceable.²² For clauses falling outside this category of complete restriction, the court's reasoning suggests that the degree to which access to the resource is limited must be considered. Factors that must be assessed include the prescribed time period, whether the contracting party against whom the time bar clause operates was aware of the contractual provision, and whether the information needed to

¹⁹ *Barkhuizen* (n 2) para 59.

²⁰ *ibid* para 64.

²¹ *ibid* para 65.

²² *ibid* paras 34, 54.

institute a legal claim falls within the knowledge of the contracting party.²³ It is therefore a matter of degree. On the facts of the case, the *Barkhuizen* majority found that the parties enjoyed a sufficient level of economic parity, and that the restriction to access a constitutionally protected resource was not of a sufficient degree to invalidate the exercise of contractual autonomy.²⁴

Barkhuizen was not a unanimous decision. Sachs J, with whom two judges concurred, held that the 90 day time period violated public policy. Taking judicial notice of the operation of the insurance industry, the judge held that the nature of the relationship between an insurer and insured is one of economic disparity given that insurance companies enjoy significant economic domination in society as they ‘play an important part in public life’.²⁵

Insurance for car users is not a luxury but part and parcel of every-day life, a virtual necessity for many vehicle owners. The insurance industry deals with members of the public who come off the streets and place their faith in the solvency, efficiency, probity and integrity of the insurers. [...] Its public service character is reflected in self-regulation as an industry, and the appointment of an Ombudsman. Insurance thus has become a necessity for large sections of our society, it is not a personal indulgence. [...] The public interest in promoting fair dealing in insurance contracts so as to protect the relatively vulnerable individuals contracting with large, specialists business firms, is accordingly strong.²⁶

Sachs J made this statement in the context of standard form contracts (which contained the impugned time bar clause). The potential shortfall with these types of contracts, the judge held, is that ‘far from promoting autonomy, they induce automatism’ as they are based solely on the will of the supplier of the service.²⁷ The solution is not however to prohibit time bar clauses. They serve legitimate aims such as the reduction of transaction costs. Rather, standard form contracts issued by an economically dominant private entity providing a service that is of a public nature ‘should appropriately be regulated to ensure

²³ *ibid* para 66.

²⁴ For a similar analysis and result, see *Gbenga-Oluwatoye v Reckitt Benkiser* 2016 (12) BCLR (CC) paras 21–25 (the court refused to invalidate an agreement that limited access to a court because the parties had ‘approximate equality of bargaining power’ and the agreement had worked for the benefit of the party seeking to invalidate it).

²⁵ *Barkhuizen* (n 19) para 146.

²⁶ *ibid* para 144.

²⁷ *ibid* para 155.

standards of fairness in an open and democratic society'.²⁸ This regulation is found in a judicial determination as to whether the contractual—

provision at issue and the extent to which, in the context of the contract as a whole, it vitiates standards of reasonable and fair dealing that the legal convictions of the community would regard as intrinsic to the appropriate business firm/consumer relationships in contemporary society.²⁹

The minority judgment found the time bar clause to be an unreasonable and unfair dealing for an array of reasons. These include that the clause: wholly favoured an economically dominant insurer without providing the insured with a directly corresponding benefit; prescribed a time period that was less than ten per cent of the prescription period usually allowed for contractual claims; allowed the insurer to keep the premium already paid while erasing the claim; and was accomplished with no obligation on the insurer to inform the insured party of the time bar clause at the time of repudiation.³⁰ In essence, the concern of the dissenting judge can be summarised as follows: the impugned time bar clause formed part of a standard form contract that was written for the main benefit of an economically powerful institution that not only restricted access to a constitutionally protected resource to a severe extent but also restricted access to a necessary public good (motor vehicle insurance).

It bears highlighting that the disagreement between the majority and minority is due primarily to an evaluation of the facts and not the law. In fact, the majority judgment concluded by noting that many of the concerns regarding power imbalances raised by the minority are valid legal considerations. Their conclusions diverged because the majority believed that the admitted evidence did not permit the court to invalidate the contract.³¹

3.2 *Economic power over a core freedom interests: Jaftha*

From an example of general economic parity we move to the *Jaftha* decision where the court recognised a relationship of unequal economic power in relation to the access of a constitutionally protected resource. As detailed in the previous chapter, the court remedied an unconstitutional statutory provision by prescribing a balancing process that

²⁸ *ibid* para 146.

²⁹ *ibid*.

³⁰ *ibid* para 183.

³¹ *ibid* paras 87–88.

requires courts to assess all relevant circumstances before permitting a home to be sold in execution. The court noted that the task of balancing aims to ensure that a home is not sold for a debt in instances where it would be considered ‘grossly disproportionate’ to do so.³² This, the court stated, ‘would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless’.³³ The judgment therefore suggests that an affluent creditor will not be able to secure the execution of a home for purposes of satisfying a trifling debt in instances where the debtor would be rendered homeless.

Though the court does not prescribe an exhaustive list of factors that must be taken into account during the enquiry, there are two notable factors that are discernable from the court’s reasoning. Reflecting the court’s general approach, the economic power exercised over an individual in relation to a constitutionally protected resource (metric two) as well as the degree to which the exercise of that power limits the resource are salient features (metric one).

There is ample experience to suggest that debt enforcement procedures without adequate safeguards lead to dire consequences for the weaker party, and the facts of the *Jaftha* case are apposite to illustrate this point. The two homeowners each had their homes sold in accordance with the challenged debt enforcement provision for failing to repay a measly loan amount of no more than R250 (£14) plus interests and costs to a financially secure creditor. To highlight the plight of the homeowners, it should be mentioned that both women were unemployed and had acquired title over their homes with the assistance of a state-subsidised housing programme. They were therefore precluded from receiving a similar housing benefit in the future. Thus, there is a need to ensure that adequate protection is afforded to the most vulnerable in society in respect to the enjoyment of their home. Mokgoro J, writing for a unanimous court, noted the following.

I emphasise that the underlying problem raised by the facts of the case is not greed, wickedness or carelessness, but poverty. What is really a welfare problem gets converted into a property one. People at the lower end of the market are quadruply

³² *Jaftha v Schoeman* 2005 (2) SA 140 (CC) para 56.

³³ *ibid* para 34.

vulnerable: They lack income and savings to pay for the necessities of life; they have poor prospects of raising loans, since their only asset is a state-subsidised house; the consequences of the inability to pay, under the law as it stands, can be drastic because they live on the thresholds of being cast back into the ranks of the homeless in informal settlements, with little chance to escape; and they can easily find themselves at the mercy of conscienceless persons ready to abuse the law for purely selfish reasons.³⁴

The importance of safeguarding a person's security of tenure to home in a constitutional democracy, the court reasoned, is on account of the fact that having a home, 'even under the most basic circumstances, can be a most empowering and dignifying human experience'.³⁵ A home secures for each person a sphere of privacy, fosters the conditions that allow for intimate private relationships to develop, and, if owned in a market economy, provides individuals with capital to transact with others and pursue their conception of the good life.³⁶ In many ways, a home signifies and financially secures the core of human autonomy.

It should however be noted that the creditor, even if indigent, may well lose access to their home. There may well be situations where the enforcement of the debt, however trifling, is required to secure the livelihood (and autonomy) of the judgment creditor.³⁷ Moreover, debt enforcement is a means to hold individuals accountable for their decisions. The protection of autonomy includes holding one responsible for the choices that are made pursuant to the exercise of autonomy. Accordingly, if a debtor acted recklessly in entering into a credit agreement or if they willingly mortgaged their property to secure a debt, it may well be appropriate to order the execution of a home.³⁸

3.3 *Political power of the media: Khumalo*

Independent media houses, which are of course motivated at least in part by financial incentives, command a central and influential role in the political arena of any

³⁴ *ibid* para 30.

³⁵ *ibid* paras 21, 39.

³⁶ *ibid* para 38.

³⁷ *ibid* para 40.

³⁸ *ibid* paras 41, 58. See *Gundwana v Steko Development* 2011 (3) SA 608 (CC) paras 50–54.

democracy.³⁹ In *Khumalo*, a unanimous Constitutional Court went so far as to label media organisations as ‘extremely powerful institutions’ on account of the fact that they enjoy the power to control access to a necessary resource in a constitutional democracy.⁴⁰ As mentioned earlier, *Khumalo* held that the media wields a significant amount of control over the ability of individuals to access and disseminate information and ideas, which is a protected resource in terms of section 16(1)(b) of the Constitution. Individuals in turn rely upon this information to form opinions, to regulate their own lives and direct their interactions with others, and to make political choices. Needless to say, and to paraphrase the court, the ability of individuals to make informed decisions depends on the manner in which the media exercises their constitutional mandate. As the court tells us, the media will either ‘strengthen’ a democratic culture or ‘imperil’ the goals of the Constitution depending on the level of rigour and reliability with which they perform their duties.⁴¹ In clear terms, the court once more suggests that it is the imbalance of power in relation to the control of a protected resource that guides the balancing process (metric two).

We should pause here to identify the reason why the court concludes that the media ‘are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression’.⁴² Section 16(1)(a) of the Constitution guarantees in express terms the ‘freedom of the press and media’. It is however of interest to note the justifications the court offers as to why there is this need to protect the activities of the media in a constitutional democracy. The judgment does not suggest that the underlying rationale of the right to freedom of expression is to secure the autonomy or other patrimonial interests of media houses. It is rather bestowed primarily as a means to enable the realisation of other constitutional rights and values. The media’s right to free expression is therefore a conduit right. The end that is to be achieved is the ability of individuals to ‘make responsible political decisions and to participate effectively in public life’.⁴³ In the context of horizontal application matters, the reasoning of the court

³⁹ It bears noting that the level of power exercised by media outlets in South Africa over necessary information is heightened given the fact that there are no more than ten media outlets that own all of the major news organisations in the country. A recent study indicates that approximately 95 per cent of the print media is owned by four companies. See Issa Sikiti Da Silva, ‘SA Media Ownership and Control in South Africa’ (Biz Community 5 March 2010).

⁴⁰ *Khumalo* (n 5) para 16.

⁴¹ *ibid* para 21.

⁴² *ibid* para 20.

⁴³ *ibid* para 21.

therefore leaves no other conclusion except that the right of the press to free expression is safeguarded only in so far as their activities contribute towards these constitutional aims.

Khumalo establishes an additional reason as to why the media is a powerful institution within a constitutional democracy, and, accordingly, why the exercise of that power needs to be controlled. No doubt the mass dissemination of information concerning a person has the potential to control or at least influence the enjoyment of two related constitutional rights. The right to a reputation and the public's estimation of your worth based on your achievements is protected by the right to have your human dignity respected. Another interest is also potentially implicated. The right to have a personal sphere of autonomy and intimacy free from both state and non-state interference is also curtailed when the media reports on the private life of individuals.

In determining whether publication was reasonable, a court will have regard to the individual's interest in protection his or her reputation in the context of constitutional commitment to human dignity. It will also have regard to the individual's interest in privacy. In that regard, there can be no doubt that persons in public office have a diminished right to privacy, though of course their right to dignity persists.⁴⁴

The importance of protecting an individual's privacy is therefore also a measurement of degree. The *Khumalo* court does not elaborate on the 'diminished' right to privacy of public officials, but an earlier judgment of the court defines the degree to which the privacy of one individual can be limited by the constitutional rights of others (metric one).

In the context of privacy [...] it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.⁴⁵

⁴⁴ *ibid* para 34.

⁴⁵ *Bernstein v Bester* 1996 (2) SA 751 (CC) para 67. See also *Magajane v Chairperson, North West Gambling Board* 2006 (5) SA 250 (CC) paras 42–43 (confirming the *Bernstein* position, including that corporate entities enjoy a lower amount of protected privacy in respect to the disclosure of relevant information to public authorities); *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) paras 35, 49; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC) paras 15–19.

4 A skeleton theory of balancing

Chapter four demonstrated that the court initially presents the balancing process as a clash between two competing rights. However, once the balancing process is established, the court no longer pits two distinct rights against one another. The court rather engages in two types of evaluations that are internal to each of the conflicting right norms. Before outlining these internal evaluations, it must be conceded that what follows is only a skeleton theory of general principles. The range of rights and interests is too diverse, social problems are multifarious, and there is perhaps an insufficient amount of case law on this matter at the present time to formulate a more detailed and concrete description. Another factor guarding against a more complete account is the Constitutional Court's warning that some problems in our society are too complex for neat and clear legal solutions.⁴⁶

The first internal metric evaluates the impact a particular measure has on the enjoyment of freedom in the exercise of human autonomy. In all three judgments discussed, the court assesses the relative importance of safeguarding the autonomy of the private individuals and entities concerned. For the majority in *Barkhuizen*, the enforcement of the time bar clause had no impact at all on the core of the autonomy of the insured, and, indeed, the enforcement of the contractual provision was viewed as a means to protect the exercise of autonomy. The *Jaftha* decision reveals a change in circumstances. Debt enforcement may negatively impact the core of human autonomy. Losing access to a home not only removes shelter but also severely diminishes the enjoyment of human dignity and privacy. The reasoning in *Jaftha* reveals another reason why the court would not enforce the execution of the home. The action of the indigent debtor was not due to autonomous choices, greed, or carelessness. Entering into these agreements to secure basic human needs was necessitated due to their impoverished state.

In essence, the court seeks to evaluate and plot the freedom interests of the disputing parties along a continuum of freedom. This range commences where the need to protect autonomy is weak and intensifies to a point where the need to protect autonomy

⁴⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 38. For similar remarks, see cases discussed in chap 4, note 4.

is virtually absolute. Writing in the context of protecting the right to privacy, the court indicated the basis on which this need-to-protect-freedom continuum moves:

A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.⁴⁷

This metric is common in the constitutional rights review of legislation, as the section 36 rights-limitation analysis similarly investigates the degree to which the infringing act impacts the core of the right.⁴⁸

The second internal metric is unique to private disputes. This metric evaluates the amount of private power exercised by a private individual or entity over the constitutional right of another, and, more specifically, the need to control the exercise of that power. Of the decisions discussed, *Khumalo* is the clearest example of a 'powerful institution' that controls access to a resource required for the cultivation of human autonomy, and for participation in public and political life. In this situation, the need to monitor the activities of this non-state entity is the strongest. *Barkhuizen* is an example of two entities entering into a commercial transaction. The relative economic positions of the parties, though of course not precisely equal, were of a sufficient equilibrium to warrant against interference in the contract. This scale can also be visualised on a continuum.

These two continuums are correlated to one another. Broadly stated, to control the exercise of power, which typically results in the imposition of an obligation, the court believes it is compelled to discount the freedom interests of the private individual or entity. When plotted on a graph, as shown in Figure 5 below, these two continuums reveal an exponentially inverted relationship. We can call this the power-freedom curve. This curve plots the exercise of power, which, in a constitutional framework, displays the level to which an entity controls access to a resource that is required for the realisation of a constitutionally protected interest.

⁴⁷ *Bernstein* (n 45) para 77. See also *Bernstein* (n 45) para 135; *NM v Smith* 2007 (5) SA 250 (CC) para 132; *S v Manamela* 2000 (3) SA 1 (CC) para 100.

⁴⁸ Constitution s 36(1)(c).

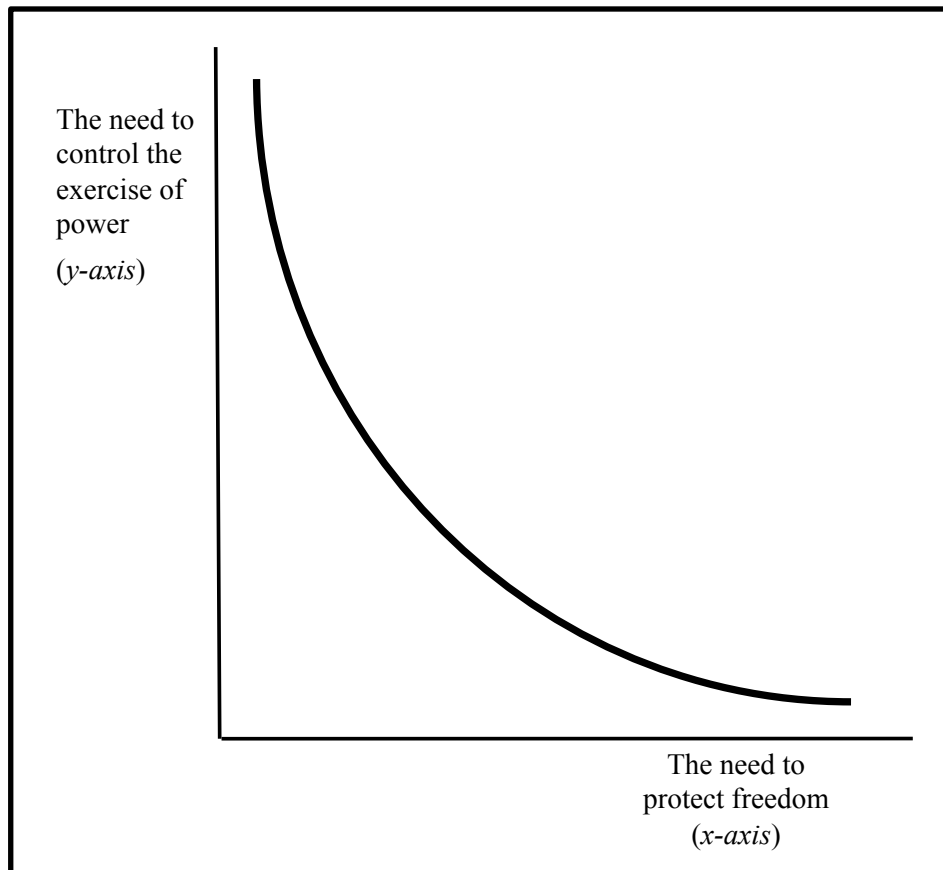


Figure 5: The power-freedom curve

At the far right of the graph is where we exercise the least amount of economic or political power. This is also where the need to protect the core of our autonomy is the strongest, which is most often considered to be the privacy of one's home. Moving to the middle of the graph is where we begin to interact with our community. We enter into commercial contracts with one another, which provide us with a degree of economic power over others (we control the actions of another and they control ours). Only a few individuals and entities are plotted on the top end of the graph. Here is where individuals actively participate in civil society, or where a private entity's economic power is so high in that they exercise a monopoly or near-exclusive control over the protection of a constitutionally protected resource or interest. Their autonomy interests in this capacity are the weakest, and the need to control their actions is the strongest.

It needs emphasis that the power-freedom curve does not denote an automatic cause-and-effect relationship. It is correlated, however, in that the court aims to diminish the autonomy interest before it is prepared to burden a private individual or entity with an obligation. In doing so, the court aims to negate one of the major criticisms directed

against the horizontal application of rights. That is, the application of rights to private individuals and entities reduces autonomy and freedom interests, which is counterintuitive under a liberal constitutional order.

The law reports record four justifications that warrant reducing the need to protect freedom. That is, to plot the interest on the left of the *x*-axis.

- First, the constitutionally protected interest of a potential duty-bearer is located at the periphery of the constitutional right, which means that it is afforded less protection than an interest at the core of the right.⁴⁹
- Second, the right is interpreted as a conduit right.⁵⁰ That is, the right is used primarily to realise other constitutional objectives. We provide freedom to these institutions to facilitate the realisation of these aims, but the state may legitimately intervene when they fail to regulate themselves in a manner that is not conducive to achieving these aims. *Khumalo* is a good example. Recall the paradoxical reasoning of the court. The court expanded the constitutional protection afforded to the media by recognising that the proper functioning of the media is an essential means to realise another set of constitutional objectives, that is, to inform citizens. Beyond the realisation of these aims, the need to protect the freedom of the media is weak. The media could for instance not claim strong constitutional protection for news stories built on falsehoods, which are published with the aim to increase profits.
- Third, the activity of the private individual or entity straddles the definition of an ‘organ of state’, in that the entity exercises a function or power that is akin to a public function or public power but does not meet all the requirements of an ‘organ of state’ as defined by section 239 of the Constitution (i.e. the power or function must be exercised in accordance with the Constitution or national legislation).⁵¹

⁴⁹ See *NM* (n 47) paras 135, 136; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para 108. See also *S v Jordan* 2002 (6) SA 642 (CC) para 29.

⁵⁰ *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC), which is discussed in chap 7.

⁵¹ *AllPay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency* (No. 2) 2014 (4) SA 179 (CC). See also *Association of Mineworkers and Construction Union v Chamber of Mines* 2017 (3) SA 242 (CC) para 69 (the court suggests that the scope of section 8 of the Constitution is broad enough include those entities that exercise a public power or function; this is the terminology used to define an organ of state in section 239 of the Constitution); *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) para 40 (the court suggests that an entity can bear obligations under both sections 239 and 8(2)).

- Fourth, the right is framed as imposing only a negative obligation.⁵² A negative duty on a private individual and entity to refrain from harm-inducing conduct is often viewed as not directly encroaching on the freedoms of other individuals, even if the duty has the consequence of diminishing freedoms.

The other disputing party can similarly be plotted on the graph. It is now their positions relative to one another that broadly suggest the nature and extent of a possible obligation. The fact that one non-state actor is placed higher on the graph than another non-state actor does not automatically mean that the weaker party's interests prevail. As demonstrated in this paper, the court seeks an appropriate justification for the encroachment on a right. The level of justification required appears contingent on the disparity in the position of the parties.

To recapitulate, horizontality forces the courts to dissect constitutional right norms into two main components. First, a constitutional right safeguards a claim to a particular interest. Second, constitutional rights are also power-conferring. In protecting certain freedoms to engage in activities, rights bestow powers on private individuals and entities. Viewed from this perspective, and in the context of horizontal application, we can say that constitutional rights come into conflict whenever a right is interpreted as affording the right holder a legal power, which, in the exercise thereof, results in the impairment of another's constitutional right to claim a particular interest. The purpose of applying constitutional rights to private legal relationships is therefore to impose appropriate limits on an otherwise constitutionally protected power so as to ensure that that the private power is not exercised in a manner that unduly encroaches upon other rights. The court has developed a broad structure to evaluate these competing components internal to rights. The main take-away from the structure is that the courts must first diminish the right to claim a particular interest before it is willing to recognise an obligation. To be clear, the structure does not create automatic trumps. The structure is utilised to impose a duty to justify the infringement, as well as determine the level of justification required. The duty to justify splits into two parts. The first is procedural, and it pertains to the duty of the power-wielding party to collect relevant information prior to deciding whether to infringe on an interest safeguarded by a constitutional right.⁵³

⁵² *Government of the Republic v Grootboom* 2001 (4) SA 46 (CC) para 34; *Sarrahwitz v Maritz* 2015 (4) SA 491 (CC) para 45.

⁵³ Chapter eight provides further examples of this procedural duty to collect information. The most notable is the duty upon landowners to engage meaningfully with unlawful occupants prior to

The second is substantive, and it evaluates the grounds upon which the power is ultimately exercised. Consider once more *Khumalo*. The media may escape liability if the publication of a defaming statement is reasonable in the circumstances. This would require the media defendant to not only demonstrate how the investigation gathered evidence, but also why the reasons for infringing a right are constitutionally acceptable.

5 Fixed rules

The balancing process may yield fixed rules if it is clear which interest should automatically prevail. Three such instances are identified from the case law.

5.1 No other competing interest

An automatic trump is recognised when there is no other competing legal interest. Slavery is a clear example. Section 13 of the Constitution guarantees for each person the right not to be subjected to slavery, servitude, or forced labour. This right is absolute in private legal relationships; it is simply unimaginable to conceive of a situation where the courts would recognise that one private individual or entity has the right to subject another to acts of forced servitude.

Section 16 of the Constitution offers another example. This provision protects the right to freedom of expression, and its importance to the practice of democracy is rehearsed above. Section 16(1) expressly protects the freedom of the press and other media, the freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research. Freedom of expression is usually evaluated along a continuum, with political speech often being awarded a high level of protection. Political speech is of course not absolute. Our courts have recognised that speech of an ‘inflammatory or unduly abusive kind may be restricted so as to guarantee free and fair elections in a tranquil atmosphere’.⁵⁴ Section 16(2) of the Constitution however proceeds to prescribe the three types of expression that are excluded from any sort of constitutional protection. Speech that (i) propagates war, (ii) incites imminent violence, or (iii) advocates hatred on the basis of race, ethnicity, gender,

seeking an eviction order as well as the duty to ascertain the availability of alternative accommodation.

⁵⁴ *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) para 29.

or religion in a way that constitutes an incitement to cause harm is afforded zero constitutional protection. The last category of excluded speech is normally summed up as ‘hate speech’. Any constitutional right that is impaired by this type of speech — which most likely will be the right to equality or human dignity — will automatically prevail.

In the democratic era, one of the few instances of the South African courts prohibiting political speech is the case of *Afri-forum v Malema*.⁵⁵ This dispute pertains to an ANC politician singing a song called ‘*Dubul’ ibhunu*’. The literal translation of the song is ‘*shoot the Boer/farmer*’, and the song includes the lyrics ‘*these dogs rape us, shoot! shoot! shoot them with a gun*’.⁵⁶ The song was originally sung by members in the anti-apartheid liberation movement, including soldiers preparing to overthrow the apartheid government.⁵⁷ The politician implicated in this dispute added the lyric ‘shoot to kill’ at the end of the song, which was accompanied with his hands gesturing the shooting of a firearm. The song invokes strong passions on either side of the debate. Members of the Afrikaans white community felt aggrieved and threatened by the lyrics. They argued that the song constitutes hate speech, as it incites hatred and harm against a racial group. The ANC, on the other hand, claimed that the song is harmless as the meaning of the song is not a literal interpretation, and that it is not sung with an intention to display a desire to actually kill a group of individuals. The reference to shooting or killing Boers/farmers is meant to symbolise the destruction of white racial oppression over the black community. The liberation song, the ANC contended, should be permitted as it forms part of the history and heritage of many people, and it is a way for citizens to show solidarity. The song embodies strong emotional feelings that stem from a shared and painful history.

Section 10 of the Equality Act prohibits hate speech.⁵⁸ It defines hate speech broadly, which is said to be the publication, propagation, advocacy, or communication of words based on any of the prohibited grounds against any person ‘that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; [or] (c) promote or propagate hatred.’⁵⁹ Following section 16(2) of the Constitution which lists incitement to violence and hatred against protected groups as

⁵⁵ 2011 (6) SA 240 (EqC).

⁵⁶ *ibid* para 59.

⁵⁷ *ibid* para 62.

⁵⁸ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁵⁹ *ibid* s 10(1). For similar observation, see *Sonke Gender Justice Network v Malema* 2010 (7) BCLR 729 (EqC) para 13.

non-protected speech, section 15 of the Equality Act states that hate speech cannot be saved by any justification. In essence, any other protected interest will always trump hate speech. Hate speech has the propensity to result in political disintegration and impair the ability of the affected groups to participate in society.⁶⁰ In this matter, the Equality Court agreed with the legislature's evaluation. The court concluded that hate speech should assume no protection under our constitutional democracy despite the fact that in this instance the political speech is personally significant to a large segment of society.

Public speech involves a participation in political discourse with other citizens, in a manner that respects their own correlative rights. Hate speech has no respect for those rights. It lacks full value as political speech. Hate speech does not address the community in general but merely a portion of it; those who are the target group. Hate speech should not be protected merely because it contributes to the pursuit of the truth. If it denies the recognition of the free and reasonable rights of others it makes no direct contribution to the process.⁶¹

The court found that the song demonstrated 'an intention to be hurtful, to incite harm and promote hatred against the white-Afrikaans-speaking community, including the farmers who belong to that group'. The song therefore constituted hate speech. Significantly, the order was not only directed at the politician. The court restrained the ANC from singing the song at any public or private meeting reasoning that the ANC has 'control over the conduct of the persons who hold rallies in its name and on its behalf'.⁶²

In both the examples of slavery and hate speech, and given that there is no countervailing right to consider, it is fair to assume that the constitutional right imposes a clear and fixed obligation upon private individuals and entities. No contextual evaluation of the facts of the case would have altered the outcome.

5.2 *Monopoly over core freedom interests*

AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency is a rare example of the Constitutional Court radically discounting the freedom interests of a private entity on account of the monopoly of power

⁶⁰ *Afri-forum* (n 55) para 29.

⁶¹ *ibid* para 33.

⁶² *ibid* para 118.

the entity exercised over the constitutionally protected resources of others.⁶³ This led to the court imposing an immediately enforceable constitutional duty upon a private entity.

In accordance with section 27(1)(c) of the Constitution, the state is obliged to provide, within its available means, appropriate social assistance to those who are financially unable to support themselves and their dependents. In South Africa, where more than 16 million people are dependent on state grants for their livelihood, the importance of this right is palpable. The right to access social security, which includes receiving social assistance grants, is a means to ensure that indigent persons are able to secure their basic human needs. This includes resources such as food, water, shelter and clothing.⁶⁴ As the Constitutional Court has informed us on numerous occasions, these basic necessities are required in order to secure the human dignity and freedom of each person.⁶⁵ The ability of a person to exercise meaningful autonomy and participate effectively in community life is contingent on the fulfilment of their basic needs.⁶⁶ Though the state has the desire to do so in the future, the South African government has to date not developed or implemented the necessary infrastructure required to disburse social assistance grants in a secure and effective manner. In order to meet its constitutional mandate, the state has therefore entered into contracts with private companies whereby the company disburses social assistance grants on behalf of the state to eligible individuals.

The *AllPay* matter arose as a result of a tender process, which awarded a national contract to a private company, being declared materially irregular and as a consequence unlawful. For our purposes we need not be concerned with the nature of the irregularities save to say that the irregularities in the bidding process prevented a fair selection process and that the private company was not at fault. In terms of the rules of administrative law, and pursuant to the principle that a flawed tender process cannot stand, the remedy usually ordered in situations where the court declares a tender process unlawful is to set aside the awarding of the contract.⁶⁷ The default remedy would however not have been an appropriate one in this matter because merely setting aside the contract would have

⁶³ *AllPay (No 2)* (n 51). This judgment is the sequel to *AllPay Consolidated Investments Holdings v Chief Executive Officer of the South African Social Security Agency (No 1)* 2014 (1) SA 604 (CC).

⁶⁴ See *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) paras 52, 114.

⁶⁵ See *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) para 8.

⁶⁶ See David Bilchitz, *Poverty and Fundamental Rights* (OUP 2007) 43–44.

⁶⁷ Promotion of Access to Justice Act 3 of 2000, s 8(1)(c).

resulted in millions of individuals not receiving their social grants. The state did not have the machinery to fill the void and it was estimated that the rerunning of the tender process would have taken at least a year to complete.

In formulating the remedy to correct the unlawful conduct of the state, the court faced a dilemma as two competing principles suggested alternative solutions. These principles were the public interest in ensuring that public procurement is fair, competitive, and cost-efficient, on the one hand, and, on the other, the need to ensure that the disbursement of social grants is not disrupted. Here, the private company sought to hold the country — and the court — hostage. The entity, which had already distributed payments for the past two years, argued that it would have no further obligation to continue to disburse social assistance grants on behalf of the state if the contract was declared invalid. A unanimous court rejected this threat on two grounds. First, the private company is classified as an organ of state, and is therefore directly bound by the Constitution and the Bill of Rights for the duration of the contract period. In terms of the court's power to issue any 'just and equitable remedy' in accordance with section 172 of the Constitution — which includes 'suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect' — the court could merely suspend the declaration of invalidity to permit the state to rerun the tender process. Suspending the invalidity of the contract until a new tender process was completed was the approach ultimately adopted by the court.

There was a second reason the court rejected the private company's argument, and, for our purposes, it is the more important one. The court held that even if the invalidity of the contract was not suspended, and, despite the fact that the company would no longer be considered an organ of state, the company would still be under a constitutional obligation to 'ensure a workable payment system remains in place until a new one is operational'. This was because the private company also incurred constitutional obligations under section 8(2) of the Constitution.⁶⁸ The court repeated its general mantra that the general purpose of the horizontal application of constitutional rights is 'not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights' but it is rather to ensure that 'private parties do not interfere with or diminish the enjoyment of a right'.⁶⁹ The court nevertheless held that

⁶⁸ The ruling was affirmed in *Black Sash Trust* (n 51) para 40.

⁶⁹ The court quoted *Governing Body of the Juma Musjid Primary School* (n 18) para 58.

this positive obligation upon a non-state actor to continue to provide the service until a new service provider was appointed was an exception to this general rule. It bears quoting the court at length.

Where an entity has performed a constitutional function for a significant period already, [...] *considerations of obstructing private autonomy by imposing duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all.* The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution — because of constitutional invalidity — means that the [the beneficiaries of the contract] would have become increasingly dependent on [the company] fulfilling its constitutional obligations.⁷⁰

The approach in *AllPay* is informed by the extreme situation of the case: the constitutionally guaranteed livelihoods of millions of people were threatened by the actions of a single profit-driven entity. The level of economic and political power exercised by the private company over both the state and the recipients of the social assistance grants was colossal, and effectively amounted to a monopoly over the infrastructure needed to realise a constitutional right. The state had no other option available. This matter is also different from the other cases as the court was not concerned with a possible justification and reasons for encroaching upon the right. The court simply held that, given the company had performed the state function for a significant period of time, the private autonomy interests of the company ‘do not feature prominently, if at all’. In essence, as the power-freedom curve predicts, the court recognised in this situation that the private company had little autonomy interests of their own which could ever outweigh the need to ensure the core of the freedoms of others are realised.

5.3 *Choices of intimate association*

Our choices relating to intimate associations tend to be afforded a high level of constitutional protection, and the courts are generally unwilling to recognise constitutional obligations that restrict decisions of close or intimate association. This is not to say that the Constitution does not permeate into certain legal areas,⁷¹ or that the power that individuals wield in close intimate associations cannot infringe upon another’s

⁷⁰ *AllPay (No 2)* (n 101) para 66 (own emphasis added).

⁷¹ *De Lange v Presiding Bishop of the Methodist Church* 2016 (2) SA 1 (CC) para 76.

constitutional right. It is rather that the courts and the legislature are ill equipped to balance our personal decisions. Our choice of association stems from our passions, emotions, and core beliefs. Our decisions with whom to form close associations are so fundamental and unique to each person's social structure and development, which renders these decisions incapable of a type of economic or legal analyses. The decision of *De v RH* neatly illustrates this situation.⁷² In this matter, the Constitutional Court abolished the common law claim of a non-adulterous spouse to claim damages from the intervening third party. The court accepted that there are two competing interests at stake. On the one hand, the innocent spouse suffers an infringement on their human dignity when a third party intrudes into a marriage. On the other hand, there is also the need to offer protection to the privacy and associations rights of the adulterous spouse and third party (even if society disapproves of their decisions). The tiebreaker was ultimately that an external force such as the courts or the legislature should not intervene in this highly personal choice. The law could generally encourage marriage or other forms of intimate relationship, but it should not penalise decisions. Each spouse should be left to make their own decisions in line with their own personal convictions, and the law should not dissuade a spouse or third party who wishes to either terminate or commence a romantic relationship.⁷³

There is however one clear instance in which the law must intervene in our intimate relationships: to prevent and punish acts of domestic violence. The authority of the state to respond to abusive relationships is historically a thorny issue, because, it is often argued, the home is a sacred space of human existence free from external control. The privacy of the home therefore warrants against interference in issues of family life. The framework sketched above makes the legal issue over intervention far less contentious. The building that makes up the family home is not a good in and of itself. It rather serves as a place to realise many of our human functions, including the development of intimate human relationships. The commission of acts of violence is simply not a constitutionally protected interest, and no person can claim that the four corners of their home insulate their decision to inflict abuse on another. In fact, section 12 of the Constitution states that individuals have the right to be free from public and private sources of violence.⁷⁴ The duty to prevent acts of domestic violence falls upon the

⁷² *DE v RH* 2015 (5) SA 83 (CC).

⁷³ See also *Magajane* (n 45) para 42.

⁷⁴ *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 65.

state, but it also has ramifications in the private common law.⁷⁵ The most notable is that the constitutional right carves out an exception to the common law rule that spouses or life partners may not exclude each other from the communal home. The Domestic Violence Act, which was promulgated to give effect to rights of equality and security of the person, authorises the courts to prohibit an abusive spouse or life partner from entering the shared home.⁷⁶

6 Taking stock

The South African Constitution assigns the judiciary a difficult law-making task. While the courts retain their inherent power to develop the common law under the new constitutional order, their law-making power is informed by the Constitution's need to control the exercise of power wielded by private individuals and entities. This mandate sets up a clash. The courts are expected to both safeguard the freedoms protected by constitutional rights, and, at the same time, ensure that the exercise of these freedoms does not unduly infringe upon the protected freedoms of others. The Constitution provides little guidance on how to implement this mandate and resolve clashes. The text merely instructs the courts to develop the law in a manner that gives effect to constitutional right norms. In providing more structure to these provisions, the Constitutional Court has settled on the 'balancing process'. The process allows the courts to move away from outright protecting one right over another. Instead, the court incorporates a contextual and flexible balancing process into the common law. This feature renders the application of the process to individual disputes more manageable as the balancing process benefits from the extensive rules, procedures, and assumption that already exist in the common law. In one sense, because the balancing process rejects fixed rules, perhaps it is fair to argue that the process purposively promotes litigation. The South African Constitution introduced a legal revolution, and it is only through the continuous judicial application of its provisions that private law can be rebuilt.

The judicial balancing process is however not the only available tool for rebuilding private law. The upcoming chapters detail another strategy of the courts, which developed in response to the constraints on the judicial law-making toolkit. The

⁷⁵ *S v Baloyi* 2000 (2) SA 425 (CC) para 16.

⁷⁶ 116 of 1998, s 7(1).

strategy is to avoid developing the common law entirely and rather pivot towards legislative remedies.

PART C

**THE JUDICIAL RESPONSE TO
LEGISLATIVE LAW-MAKING**

AVOIDING THE COMMON LAW: THE RIGHT TO ACCESS ADEQUATE HOUSING

This chapter uses the case law on section 26 of the Constitution — which guarantees access to adequate housing — as a case study to illustrate an instance where the Constitutional Court avoids requests to develop the common law (and rather pivots towards legislative remedies).

1 An anomaly in the case law

One of the few uncontested principles in South African socio-economic rights discourse is that section 26 of the Constitution — which safeguards the right of each person to have access to adequate housing — imposes a negative obligation upon all private individuals and entities.¹ This obligation, the Constitutional Court has repeatedly held, requires private individuals and entities to refrain from conduct that impairs another individual's existing access to an adequate home.² It is thus a duty to do-no-harm. While this

¹ Constitution s 26:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all of the relevant circumstances. No legislation may permit arbitrary eviction.

² *Government of the Republic v Grootboom* 2001 (4) SA 46 (CC) para 34; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 46; *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC) para 32; *Sarrahwitz v Maritz* 2015 (4) SA 491 (CC) para 45. The Constitutional Court does not always expressly reference the obligation upon private individuals and entities, but merely states that 'any measure', whether taken by either a state or a non-state actor, that impairs or deprives a person from existing access to an adequate home is an infringement

interpretation of section 26 remains unchallenged in judicial and academic writing, giving legal effect to the obligation has proved considerably more difficult. In a string of recent judgments, the Constitutional Court has refused to rule on whether or not — and, if so, the extent to which — the constitutional obligation necessitates the development of the common law. Their refusal to do so is notable. It stands at odds with the provisions of the Constitution that require the judiciary to develop the common law whenever it is necessary give effect to the constitutional obligations of private individual and entities, which, as Part B of the thesis has already demonstrated, is a law-making mandate the Constitutional Court usually fulfils.

The court's refusal to entertain the common law question hints at a strategy of avoidance. Although the court has never detailed the existence of such a strategy, the suspicion that the court intentionally refrains from entertaining questions on the application of section 26 to the common law gains further credence when one considers the fact that the scope of the constitutional right — and therefore the scope of the duty upon private individuals and entities — is in a state of flux. The case law discussed in this chapter shows that the scope of the right deflates when the obligation is applied to the common law, and inflates when the obligation is interpreted within statutory schemes.

The deflated reading views section 26 predominantly as a procedural right, which is an instruction directed at the decision-maker (i.e. judges). In other words, the constitutional right requires the judiciary to oversee any legal process that may result in the loss of an adequate home. The benefit of an independent legal procedure is clear. The forced removal of a person from their home is amongst the most distressing human experiences, and is likely to have a drastic impact on the evictee's livelihood. Judicial supervision ensures that these harsh consequences only proceed as a measure of last resort, as the purpose of the procedural right is to identify whether the home occupier holds any possible legal defence that could either deny or delay eviction. From this perspective, the housing right is a mechanism to protect any pre-existing right — whether found in the common law, customary-indigenous law, or legislation — that permits the continued occupation of the property. The importance of this procedural safeguard must

of the right. See *Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 78; *Jaftha v Schoeman* 2005 (2) SA 140 (CC) paras 33–34; *Governing Body of the Juma Musjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 58. The Supreme Court of Appeal has also recognised the negative obligation upon private individuals and entities. See *Standard Bank v Saunderson* 2006 (9) BCLR 1022 (SCA) para 12; *Maphango v Aengus Lifestyle Properties* [2011] 3 All SA 535 (SCA) para 26.

be stressed. Individuals at risk of eviction are likely to be among the most economically impoverished in society, and their poor socio-economic status means that they are unlikely to obtain effective legal advice and representation. Mandatory judicial oversight mitigates the adverse effects poverty has on the ability of indigent persons to secure their rights. The process requires courts to assume a more active role in housing eviction litigation, and may require judges to enquire into the facts of the case even if the parties do not raise potential points of dispute.³ The scope of protection afforded by the narrow-procedural reading of the obligation is however limited. If the matter is duly brought before a court of law, and the court is satisfied that there are no legal defences available to the home occupier, a court enjoys no discretion to refuse an eviction application. This is the case even if the soon-to-be evictee would be rendered homeless. The housing right simply does not compete against other substantive legal rights. An ownership right, for instance, would always trump the need to be housed. In sum, the deflated-procedural reading of the obligation means that section 26 cannot assist home occupiers who enjoy no common law, customary-indigenous law, or statutory right to reside on the property.⁴

The inflated reading of the obligation includes the procedural component of the right but balloons to safeguard an occupier's interest in having uninterrupted access to an adequate home. That is, section 26 generates a sort of substantive legal interest that stands independent of other laws.⁵ These substantive protections may, in appropriate circumstances, offset the legal rights of another person. The inflated-substantive reading of the obligation means that the duty to do-no-harm is not purely inhibitory as the application of the obligation to the common law may lead to restrictions on ownership and contract rights to guard against occupants becoming homeless.⁶ The ambit of the

³ See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 32, 36; *The Occupiers, Shulana Court v Steele* 2010 (9) BCLR 911 (SCA) para 12.

⁴ For a scholarly analysis receptive to the narrow reading, see AJ van der Walt, *Constitutional Property Law* (3rd edn, Juta 2011) 522 (the author argues that the negative component of section 26 only provides a defensive right; the housing right places only certain limits on the right to evict but does not bestow a sort of substantive property right).

⁵ For support of the expanded reading, see Sandra Liebenberg, *Socio-Economic Rights* (Juta 2010) ch 7 (the author criticises judgments that decline to apply the substantive component of socio-economic rights to the common law, arguing that these judgments run against the transformative goals of the new constitutional order).

⁶ See *Daniels v Scribante* 2017 (4) SA 341 (CC) paras 50–51; *Occupiers of Erven 87 & 88 Berea v De Wet* 2017 (5) SA 346 (CC) para 65.

expanded-substantive reading is somewhat murky however.⁷ The case law that applies this reading has yet to offer a comprehensive analysis on the precise scope of the substantive interests that section 26 protect.⁸ Despite the elusiveness of a concrete definition, the most expanded reading of the negative obligation suggests that any legally sanctioned act that causes a retrogressive effect on an individual's existing access to an adequate home is an infringement of the housing right. It is therefore not only evictions that violate the section 26 housing right. Any act that diminishes the legal right to reside — for example, the termination of a lease agreement or the attachment of residential property to satisfy a debt — is a measure that infringement upon the constitutional right.

The analysis ahead shows that while the Constitutional Court favours the inflated-substantive reading within its own case law, it has never sought to confirm or correct the deflated-procedural reading of the obligation employed by lower courts. When the apex court is invited to develop the common law — and either confirm or correct the deflated-procedural reading — the court opts to convert the matter into a legislative dispute. In doing so, the Constitutional Court effectively condones the use of the narrow reading for purposes of the common law. Home occupiers are nevertheless afforded more substantive protection when the court converts a common law dispute into a legislative one. In sum, the pivot from the common law to legislation is a strategy to move away from the deflated-procedural reading towards the more inflated-substantive reading of the obligation.

⁷ The narrow-procedural and expanded-substantive readings of the obligation are perhaps best viewed as a range of options situated on a spectrum. The discussion maintains the binary approach to demonstrate the avoidance of the common law and pivot towards legislation.

⁸ Perhaps one will never be forthcoming. The inflated reading stems from the positive obligation of socio-economic rights, which the Constitutional Court has resisted giving a fixed interpretation. See chap 8, sec 4.

2 Eviction case law

The negative component of section 26(1) of the Constitution is delineated, though not exhaustively, by section 26(3).⁹ The subsection prohibits arbitrary evictions, and provides that no person may be evicted from their home unless a court orders their eviction after having considered ‘all of the relevant circumstances’.¹⁰ The early case law on section 26(3) focused on whether or not this constitutional provision altered the common law. The pre-Constitution common law rule on land-ejectment orders is clear in its formulation and unequivocal in its application. A judge enjoys no discretion to refuse to grant an ejectment order if (i) the plaintiff proves ownership of the property and that the defendant is in occupation of the property and (ii) the defendant fails to prove a lawful reason for occupation, for example, a lease agreement or a statutory right.¹¹ After the enactment of the Constitution, the question was whether ‘relevant circumstances’ include more than a clear legal right to reside. In other words, does section 26(3), read with section 26(1), only protect a procedural right prior to eviction or does the right generate substantive protections that can offset the legal rights of a property owner?

2.1 *The deflated-procedural reading (as applied to the common law)*

Early high court judgements offered split opinions. *Ross v South Peninsula Municipality* favoured the inflated-substantive reading. The high court held that section 26(3) of the Constitution altered the common law to the advantage of the occupier.¹² In addition to proving ownership and unlawful occupation, the property owner must now also allege all relevant circumstances as a condition to an ejectment order. The court held that it was unnecessary to speculate on the circumstances that should be regarded as relevant to this substantive enquiry, but suggested that courts could take guidance from relevant legislative schemes to identify pertinent factors (e.g. poverty and ensuing hardship).¹³ The opposite conclusion was reached in *Betta Eindomme (Pty) Ltd v Ekple-Epoh*.¹⁴ Here the high court held that section 26(3) is confined to vertical application disputes. The purpose of section 26(3) is only to ensure that the state does not enact legislation that

⁹ *Grootboom* (n 2) para 34.

¹⁰ Constitution s 26(3).

¹¹ *Graham v Ridley* 1931 TPD 476 at 479. See also *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A.

¹² 2000 (1) SA 589 (C) at 596H.

¹³ *ibid* at 596I–J, 599B–C.

¹⁴ 2000 (4) SA 468 (W).

interferes with ownership and the possession of a home. The constitutional right therefore does not change the common law. In addition to restricting the application of the provision, the court held that the right only aims to prevent ejectment when the home is ‘truly and by all standards’ the home of the occupier.¹⁵ Section 26(3) offers zero protection to unlawful occupiers. The *Bette Eindomme* court stressed that an inflated reading of section 26(3) would restrict ownership rights and impose inequitable obligations on landowners. It could not have been the intention of the drafters of the Constitution, the high court concluded, that a landowner would have to provide housing to the general public.¹⁶ The legislature would have to make itself clearer if the intention is indeed to limit the common law right of ownership.¹⁷

The Supreme Court of Appeal overruled both *Ross* and *Bette Eindomme* in the judgment *Brisley v Drotsky*, which to this day remains the black-letter common law position.¹⁸ *Brisley* stems from the decision of a landowner to cancel a residential lease agreement on account of unpaid rent. The high court issued an eviction order at the request of the landowner, but, on appeal, the unlawful occupier argued that the high court failed to consider ‘all of the relevant circumstances’ as required by section 26(3) of the Constitution. The occupier contended that the high court should have considered her and her child’s poor socio-economic status. Though this argument is not fully explained in the written judgment, the presumable logic of this contention is that a court should deny or delay an ejectment order whenever an eviction from a home would have a detrimental impact on the evictees’ livelihoods. In rejecting the conclusion of *Bette Eindomme*, the SCA held that section 26(3) is indeed capable of finding horizontal application. There is no sound reason, the SCA opined, as to why the provision that ‘[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances’ cannot or should not apply to private

¹⁵ *ibid* at 472I–J.

¹⁶ *ibid* at 473A–E.

¹⁷ *ibid* at 475D–G. See also *Ellis v Viljoen* 2001 (4) SA 795 (C) at 805A–807B. The high court supported the passage in *Betta Eindomme* that held that the Constitution has not altered the common law right of ownership. Section 26(3) is therefore only a procedural right, and applicable only where the occupation was at all times unlawful. An occupier holding over on a lapsed lease agreement was therefore not protected. It is only a valid common law or other statutory defence to the *rei vindicatio* that is a relevant factor.

¹⁸ 2002 (4) SA 1 (SCA).

individuals and entities who seek to evict an unlawful occupier in accordance with the common law.¹⁹

The scope of protection is narrow, however. The SCA concluded that the provision is only a procedural right. That is, section 26(3) only safeguards the right to a legal procedure of judicial oversight prior to an eviction from privately owned land. The SCA noted that section 26(3) does not list the circumstances that are relevant to this enquiry. Adopting an interpretation that can only be described as shallow and perhaps even inscrutable — the judgment merely states without more that the ‘generally applicable law should be looked to’ — the court concluded that ‘relevant circumstances’ could only mean those circumstances that are considered ‘legally’ relevant.²⁰ In other words, ‘relevant circumstances’ include only legal rights that are contained in statutes, common law, or customary-indigenous law. The law entitles the landowner to the full use of their property, and a court has no discretion under section 26(3) to refuse to grant an ejectment order if the owner is legally entitled to one. The constitutional right therefore only prevents the eviction of a lawful occupier.²¹ Section 26 affords no sort of substantive right that would authorise the continued unlawful occupation of a property. This is even in a situation where the ejectment results in homelessness. Quite simply, the SCA said in outright terms, the personal circumstances of the evictee or the availability of alternative accommodation are irrelevant to this judicial enquiry.²² The court thus proceeded to overturn the holding in *Ross* that the evaluation extends beyond established legal rights in subordinate sources of law. The SCA fortified this procedural reading of the obligation by continuing to suggest that the personal socio-economic status of an evictee may perhaps become ‘legally’ relevant in a scenario where the legislature has expressly empowered the courts with a discretion to refuse an eviction order on considerations of fairness and justness.²³

The SCA views section 26(3) as no more than a codification of a common law rule of procedure that requires an owner to follow due legal process to regain possession

¹⁹ *ibid* para 40.

²⁰ *ibid* para 42.

²¹ *ibid* para 43.

²² *ibid* paras 41–42. Compare the minority judgment of Olivier JA in *Brisley* para 87 (considerations of reasonableness and fairness may at the very least require the temporary suspension of the eviction order in appropriate circumstances).

²³ *Brisley* (n 18) paras 42, 45. The SCA confirmed this approach in *City of Johannesburg v Rand Properties* 2007 (6) SA 417 (SCA) para 40.

of their immovable property. It is an established principle of civil procedure that a landowner is precluded from using force or other acts of intimidation to remove an unlawful occupier.²⁴ A lawful eviction is conditional on a court of law ordering an ejectment, which is an order usually issued when a property owner proves that the occupier enjoys no contractual or statutory right to occupy.²⁵ The principle that property owners should not take the law into their own hands is given expression in the common law remedy of the *mandament van spolie*.²⁶ In the context of property evictions, this remedy aims to prevent landowners from depriving an unlawful occupier from their existing access to a residence without acquiescence or judicial order.²⁷ It is for this reason that the SCA's deflated-procedural reading of section 26(3) is of no appreciable effect, except to confirm that the pre-Constitution common law is consistent with the Constitution. *Brisley* and *Bette Eindomme* therefore establish a distinction without a difference. Interpreting section 26(3) as only protecting a right to a judicial procedure leads to the exact same outcome as if the court had held that section 26(3) finds no horizontal application. On account of both the shallow legal reasoning as well as the more general tendency of the courts not to develop the common law in accordance with socio-economic rights, it is difficult not to draw the inference that the willingness of the *Brisley* court to read section 26(3) as finding horizontal application was only on account of the fact that it would not add to or detract from the common law. More specifically, the horizontal application of the right would effectively neither impose an obligation on a private individual or entity nor limit any existing right at the common law.²⁸

²⁴ See *Boompriet Investments v Paardekraal Concession Store* 1990 (1) SA 347 (A) at 353C–D; *Yeko v Qana* 1973 (4) SA 735 (A) at 739G–H.

²⁵ *Graham* (n 11).

²⁶ The maxim of the remedy is summed up as '*spoliatus ante omnia restituendus est*' (possession must be returned before a court will enquire into who owns the property).

²⁷ See *Rikhotso v Northcliff Ceramics* 1997 (1) SA 526 (W) at 532G–533F; *Fredericks v Stellenbosch Division Council* 1977 (3) SA 113 (C) at 116H–117A.

²⁸ If this inference is correct, *Brisley* stands open to attack. A claim that a constitutional provision should be interpreted by referencing subordinate sources of law is constitutional heresy. Constitutional rights test the validity of the rules contained in statutes, the common law, and customary-indigenous law. The scope of the right cannot depend on whether these subordinate sources of law already comply with these rights. Any concerns that stem from a particular interpretation of a constitutional right should rather be dealt with at the limitation or remedy phases.

2.2 *The inflated-substantive reading (as applied to legislation)*

The *Brisley* judgment's comparison of section 26(3) to an imagined legislative scheme that authorises judicial discretion on grounds of equitability was neither coincidental nor hypothetical. Three days prior to handing down *Brisley*, the SCA delivered judgment in *Mkangeli v Joubert* (Brand JA authored *Mkangeli* and co-authored *Brisley*).²⁹ *Mkangeli* adjudicated a dispute pleaded under the Extension of Security of Tenure Act (ESTA).³⁰ ESTA was enacted pursuant to two constitutional rights. Section 25(6) of the Constitution, read with section 25(9), obliges Parliament to enact legislation that provides legal security or comparable redress to individuals and communities whose land tenure is insecure as a result of past racially discriminatory laws.³¹ The Act also aims to give effect to section 26 of the Constitution. Though the preamble of the Act does not expressly reference the housing right, the Constitutional Court has read ESTA to form part of the state's obligation under section 26 of the Constitution to provide and protect access to adequate housing reasoning that security of tenure is intended to guard against homelessness.³²

ESTA protects occupiers who had once received consent to reside on rural or peri-urban land, and the Act grants these occupiers two tiers of protection. First, ESTA restricts the power of the landowner to rescind the consent to reside. Section 8 of ESTA prescribes that a landowner may only terminate the right to reside on lawful grounds (which, for the most part, are grounds established in common law) and furthermore 'provided that such a termination is just and equitable'. This equitability determination must have regard to 'all relevant circumstances', but should include: (i) the fairness of the agreement; (ii) the conduct of the parties that gave rise to the termination; (iii) the comparative hardship that would be experienced after termination; (iv) the existence of a reasonable expectation to renewal; and (iv) the fairness in the procedure employed to terminate the right to reside, including whether the occupiers should have had an opportunity to make representations. Relevant circumstances are therefore not limited to pre-Constitution private law rights, but also extend to relevant interests that flow from the need to be housed.

²⁹ 2002 (4) SA 36 (SCA).

³⁰ 62 of 1997.

³¹ See discussion in chap 2, sec 3.

³² *Molusi v Voges* 2016 (3) SA 370 (CC) para 23.

Second, if the decision to terminate the consent to reside is just and equitable, ESTA also restricts the capacity of the landowner to obtain an eviction order. It grants both procedural and substantive safeguards. The procedural protections require the landowner to notify the occupiers and municipality of the intention to apply for an eviction order. The notice, which must be given at least two months prior to instituting an application, must be in writing and disclose the grounds on which the eviction is based.³³ Then, before issuing an eviction order, a court must request a designated officer to submit a report that evaluates relevant circumstances.³⁴ This leads to the substantive protections. ESTA provides that a court may only evict a protected occupier if it is ‘just and equitable to do so’.³⁵ This is a discretionary enquiry, although the Act prescribes non-exhaustive factors that a court must consider. Depending on when occupation first took place, these broadly phrased factors include: (i) the availability of suitable alternative accommodation, and the efforts that were taken to find such accommodation; (ii) the interests of the person in charge of the land and the occupier of the land, including the ‘comparative hardship’ that would ensue following ejectment; (iii) the period of occupation; (iv) the fairness of the agreement that allowed initial occupation; and (v) the reasons for the proposed eviction.³⁶

The central question raised in *Mkangeli* was whether ESTA only applied to an eviction application at the instance of a landowner, or whether a non-owner was also required to follow the procedures of the Act to evict a protected occupier. The non-owners in this matter argued that ESTA should not be applicable as doing so would limit their common law property rights. For example, the right to curtail acts of nuisance that disrupt adjacent property. The SCA rejected the argument. The corollary of the comprehensive protection afforded to protected occupiers is that the legislature ‘intended to impose extensive limitations’ on the common law rights of property owners and other third parties.³⁷ The SCA went onto note that the ‘common law affords the strongest protection against unlawful occupation to the owner of land’ and it is ‘therefore difficult

³³ ESTA s 9(2). The Act requires notification of the provincial office of the Department of Rural Development and Land Reform. The notification requirement is complied with if the notice to apply for an eviction has been given to all required parties at least two months before the hearing of the application.

³⁴ *ibid* s 9(3).

³⁵ *ibid* ss 10(3), 11(1)–(2).

³⁶ *ibid* ss 10(3), 11(3).

³⁷ *Mkangeli* (n 29) para 17.

to imagine why the Legislature would so severely curtail the rights of owners of land, but refrain from imposing any restrictions on the rights of third parties who seek the eviction of an unlawful occupier from land that does not belong to them'.³⁸ Owners and non-owners alike must point towards factors to show that the eviction of a protected occupier is 'just and equitable' in the circumstances. ESTA therefore carves away at the strong protection the common law affords property owners.

2.3 *Position of the Constitutional Court*

The Constitutional Court has yet to entertain the question on the extent to which section 26(3) restricts the common law right to an ejectment order. The Constitutional Court was however presented with an opportunity to either confirm or correct the *Brisley* court's procedural reading of section 26(3) in the recent decision of *Molusi v Voges*.³⁹ In this matter, the landowner instituted action for the eviction of six occupiers. On appeal to the apex court, the question litigated was whether the procedural and substantive requirements for an eviction order under ESTA were satisfied. The nub of the complaint, which the apex court upheld, was that the SCA granted an eviction order that was effectively based only on common law grounds (the court found that the SCA had focused mainly on the *rei vindicatio* – the common law action for protecting ownership).⁴⁰ The purpose of ESTA, the Constitutional Court held, is 'to improve the conditions of occupiers on farm land and to afford them substantive protection that the common law remedies may not afford them'.⁴¹ ESTA achieves this purpose by altering the common law right to terminate an agreement as well as the common law right to an eviction order to the benefit of the protected occupiers.⁴²

³⁸ *ibid* para 23.

³⁹ *Molusi* (n 32).

⁴⁰ *ibid* para 45. The court held at paragraph 39 that—

ESTA requires that the two opposing interests of the landowner and the occupier need to be taken into account before an order for eviction is granted. On the one hand, there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other, there is the genuine despair of our people who are in dire need of accommodation. Courts are obliged to balance these interests. A court making an order for eviction must ensure that justice and equity prevail in relation to all concerned. It does so by having regard to the considerations specified in [ESTA] which make it clear that fairness plays an important role.

⁴¹ *ibid* para 7.

⁴² *ibid* paras 34–37.

Though the court was not investigating whether section 26(3) necessitates the development of the substantive rules of the common law, the court's obiter holdings appear to suggest that *Brisley* may perhaps be correct.⁴³ Or, at the very least, there is no pressing need to overturn *Brisley* (because, as will be shown later on, the court views legislation as the more appropriate means to resolve these types of disputes). In the *Molusi* matter, the Constitutional Court criticised the Supreme Court of Appeal for effectively applying common law principles to an eviction dispute. The Constitutional Court's criticism was not that the SCA applied a common law rule that failed to reflect constitutional norms, but rather that the SCA failed to apply a legislative's framework that aims to give effect to constitutional rights.⁴⁴ The court differentiated common law remedies from statutory remedies by noting that in *Brisley* the SCA—

with reference to section 26(3) of the Constitution, held that the circumstances a court is required to consider can only be relevant if they are 'legally' relevant. The Supreme Court of Appeal correctly distinguished this case from *Brisley* because, here, the 'ejectment against an unlawful occupier [is] limited by the provisions of ESTA', and because 'reliance on the common law does not exonerate the owners from compliance with the provisions of ... ESTA'.⁴⁵

In sum, on the question as to whether section 26(3) altered any substantive rules of the common law, the eviction judgments display a distinction between the respective roles of the legislature and judiciary. *Brisley*, which focused on the common law, held that no substantive rights were generated. *Mkangeli*, in comparison, held that legislative provisions that are enacted to comply with the state's constitutional obligations generate substantive (statutory) rights that may limit property rights. The distinction created in *Brisley* and *Mkangeli* echoes through the Constitutional Court's jurisprudence on the application of the section 26 adequate housing right to private legal relationships.⁴⁶ Given that the apex court permits lower courts to read the scope of the obligation narrowly for purposes of its application to the common law, the right is forced to assume a deflated-procedural reading when applied to non-statutory law. It morphs, however, into a more inflated-substantive reading when applied within a legislative framework. Here, section 26 generates substantive protections that may offset common law property rights.

⁴³ *ibid* paras 26, 43.

⁴⁴ *ibid* para 30.

⁴⁵ *ibid* para 19.

⁴⁶ See also *Occupiers of Erven 87 and 88 Berea* (n 6) paras 43–57.

The reason the Constitutional Court has yet to entertain the common law question is largely due to the fact that the legislature has promulgated a series of legislative schemes that aim to afford a certain level of protection to unlawful occupiers. These legislative schemes are not discretionary, and housing eviction applications can no longer be entertained in accordance with the common law.⁴⁷ The apex court has not however been able to avoid the debate in areas where the legislature failed to act. The next two sections tell of such instances.

3 Sarrahwitz v Maritz

Mrs Sarrahwitz concluded a contract of sale for the acquisition of a home. The purchase price was set at a relatively meagre R40,000 (around £2,000). Yet, like the grim economic reality that paralyses millions of South Africans, she was unable to finance the transaction with her own savings and income. Mrs Sarrahwitz convinced her employer to lend her the funds, and, with this cash in hand, she paid the full purchase price in a single transaction. She took occupation of her home shortly thereafter. Out of no fault of her own, and despite a number of futile requests that it be done, the property was never registered onto her name in the deeds office. Ownership was therefore never transferred.⁴⁸ The troubles started when, four years after concluding the contract of sale, the seller was sequestrated. As a result, Mrs Sarrahwitz's home fell into the insolvent estate. The common law provides the trustee of an insolvent estate with a discretion in respect to all uncompleted contracts. The trustee must elect to either perform or terminate the contract, which is an election that must be made having regard to the general interest of all the creditors.⁴⁹ In this matter, the trustee opted to terminate the contract. In the exercise of this discretionary power, Mrs Sarrahwitz's legal rights diminished drastically. She went from enjoying a contractual claim for the transfer of ownership to merely becoming an unsecured concurrent creditor.⁵⁰ Her position was made far worse when the

⁴⁷ See *Occupiers of Erven 87 and 88 Berea* (n 6) para 53; *Machele v Mailula* 2010 (2) SA 257 (CC) para 15.

⁴⁸ Deeds Registries Act 47 of 1937, s 16 (land ownership is conveyed by means of a deed of transfer that is attested or executed by the Registrar of Deeds).

⁴⁹ *Glen Anil Finance v Joint Liquidators, Glen Anil Development Corporation* 1981 (1) SA 171 (A) at 182D–H; *Goodricke & Son v Auto Protection Insurance* 1968 (1) SA 717 (A) at 724. Some authors prefer the view that trustees do not have the power to terminate a contract, but rather only the power to exclude a claim of specific performance. See Robert Sharrock and others, *Hockley's Insolvency Law* (6th edn, Juta 1996) 62.

⁵⁰ *Glen Anil* (n 49) at 182G–H.

insolvent trustee favoured another, presumably larger, creditor. The next step was clear. Mrs Sarrahwitz would likely be evicted from her home, and was at risk of becoming homeless.

Mrs Sarrahwitz launched a high court application to secure the continued possession of her home. She requested an order directing the trustee to transfer the property onto her name, which was a claim grounded on section 22 of the Alienation of Land Act (Land Act).⁵¹ Section 22 falls under the chapter ‘Sale of Land on Instalments’. The chapter is the principle legislative framework for the sale of residential properties that are sold in instalments, and it provides the minimum requirements with which these instalment agreements must comply. This includes, amongst other requirements, consensus on the applicable interest rates and the dates on which instalment payments are due. Section 22 of the Land Act governs the situation where the seller becomes insolvent. The provision is a consumer protection provision, and it aims to increase the legal rights of home purchasers against the claims of other creditors. The provision provides that a purchaser of residential immovable property who had bought the property on two or more instalments may demand transfer of ownership in the event that the seller becomes insolvent. Transfer of the property is however subject to the purchaser paying all outstanding amounts to the insolvent estate. Section 22 of the Land Act therefore limits the otherwise discretionary common law powers of insolvent trustees.

The problem for Mrs Sarrahwitz, the high court confirmed, was that she could not claim the protection afforded by the Land Act.⁵² Section 22 only applies to instalment sale agreements, which the Act defines as agreements composed of at least two separate instalment payments. Mrs Sarrahwitz had paid the full purchase price in a single cash transaction. In accordance with the residual rules of the common law, the high court concluded, a cash purchaser enjoyed no right to claim ownership should the insolvent trustee elect to terminate the sale contract. The law therefore extended protection to one group of home purchasers, but not another. To remedy the difference in treatment, Mrs Sarrahwitz petitioned both the high court and thereafter the SCA for leave to appeal. She argued that the common law is unconstitutional to the extent that it precludes a financially vulnerable person who had paid the full purchase price in a single transaction to claim ownership against an insolvent estate in situations where the purchaser was at risk of

⁵¹ 68 of 1981.

⁵² *Sarrahwitz v Maritz* [2013] ZAECHGHC 10, unreported judgment, 7 February 2013 para 12.

homelessness. She therefore contended that the common law (pertaining to the discretionary powers of trustees) should be developed to protect cash purchasers of homes in the same way that section 22 of the Land Act protects instalment sale purchasers. The argument rested on a number of constitutional rights, including the right to access adequate housing. Both the high court and SCA dismissed the petition.

3.1 *The pivot away from the common law*

The Constitutional Court granted leave to appeal, but not on the ground requested.⁵³ The court also concluded that the plea to develop the common law should be dismissed. The reason provided was not that it was inappropriate to introduce this question on appeal, which was the ground on which both the high court and SCA relied. Rather, the court held, it was unwise to entertain a request for the development of the common law if the high court and SCA had not offered an opinion on the matter. In support of this proposition, the court cited earlier case law that established the general principle that the apex court should refrain from developing the common law until the High Court and Supreme Court of Appeal have had opportunity to investigate whether the common law is in need of development.⁵⁴ This principle, the court emphasises, is of ‘particular importance’.⁵⁵ The lower courts enjoy an expertise in the application of the common law, and the Constitutional Court benefits from their views as to whether, and, if so, how, the common law ought to be developed. The apex court will therefore decline to entertain questions on the development of the common law as a court of first and last instance.⁵⁶

The rule is not inflexible, however. In the past, the court has recognised that in ‘exceptional circumstances’ it would adjudicate a request without the considered opinions

⁵³ *Sarrahwitz* (n 2).

⁵⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 53; *Amod v Multilateral Motor Vehicle Accidents Funds* 1998 (4) SA 753 (CC) para 33.

⁵⁵ *Amod* (n 54). See also *Mighty Solutions v Engen Petroleum* 2016 (1) SA 621 (CC) para 43–44; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) para 104.

⁵⁶ *Crown Restaurants v Gold Reef City* 2008 (4) SA 16 (CC) paras 5–6; *Lane and Fey v Dabelstein* 2001 (2) SA 1187 (CC) para 5. See also *Bruce v Fleecytex Johannesburg* 1998 (2) SA 1143 (CC) para 8; *S v Bequiot* 1997 (2) SA 887 (CC) para 15. The decision of *Crown Restaurants* is particularly relevant. The court was called upon to consider whether constitutional values require the reintroduction of the *exceptio doli generalis* as a defence to a claim of specific performance. The court dismissed the case on the ground that the argument was introduced on appeal.

of the lower courts.⁵⁷ Further, and in matters not considered exceptional, the failure of a litigant to invite the high court or SCA to pronounce itself is not automatically fatal. In a few cases, the court remitted disputes back to the high court to consider whether the common law should have been developed.⁵⁸ The ground for doing so is based on section 39(2) of the Constitution, which requires the courts to develop the common law in a manner that ‘promote[s] the spirit, purport and objects of the Bill of Rights’.⁵⁹ The provision enjoins the courts to be alive to the possibility of developing the common law to meet constitutional norms. This general mandate is not discretionary, and applies even if the parties had not expressly requested such an intervention in their initial pleadings.⁶⁰ The Constitutional Court’s decision in *Everfresh Market Virginia v Shoprite Checkers* illustrates the potential operation of the section 39(2) mandate.⁶¹ The main issue for resolution was the development of the common law of contract in light of constitutional values, but, like *Sarrahwitz*, the argument was only introduced on appeal. The court split 7-4. The minority judgment held that the common law may require developing, and concluded that it would have sent the matter back to the high court for reconsideration. The majority of the court was sympathetic to the argument for development, but ultimately dismissed the case. The majority held that the potential violation of a constitutional right in the matter was not serious enough to warrant overriding the general rule that litigants should formulate their cause of action from the outset.⁶²

Based on the court’s previous history, the options appeared threefold for the *Sarrahwitz* court. The court could recognise the matter as an exceptional circumstance and entertain the matter as a court of first and last instance, dismiss the case for failure to plead the cause of action from the outset, or remit the matter back to the high court on the basis of section 39(2). Remittance seemed a viable option. The *Sarrahwitz* judgment highlights many factors that have in prior decisions justified sending the matter back to

⁵⁷ *Crown Restaurants* (n 56). Though the court did not employ the language of ‘exceptional circumstances’, a possible example is *Ramakatsa v Magashule* 2013 (2) BCLR (CC). In this matter, and without assistance from the high court or SCA, the court effectively developed the common law rules of contract pertaining to the internal organisation of political parties in accordance with section 19 of the Constitution. This matter was urgent. Further, the legal development did not involve policy complexities, which probably made the court less nervous about entertaining the application as a court of first and last instance.

⁵⁸ *Carmichele* (n 54).

⁵⁹ Constitution s 39(2), quoted in chap 4, sec 3.

⁶⁰ *Carmichele* (n 54) para 39; *Mighty Solutions* (n 55) para 44.

⁶¹ 2012 (1) SA 256 (CC).

⁶² *Sarrahwitz* (n 2) para 76.

the high court for additional argument. The main factor being the severe impact the high court judgment would have on the livelihood of the purchaser, namely homelessness. In addition, the Chief Justice remarked that the high court had indeed failed to meet the general mandate imposed upon the courts to ensure that the common law complies with constitutional norms.⁶³

None of these options were adopted. The court instead issued an order directing the cabinet minister responsible for the administration of the Land Act be joined to the proceedings.⁶⁴ The court thereafter requested the parties (including the minister) to address the question as to whether the Land Act is unconstitutional for its failure to extend protection to purchasers whom had paid the full purchase price in a single transaction.⁶⁵ The procedural novelty of these orders must be highlighted. *Sarrahwitz* is the first time the court converted a request for the development of the common law into the judicial review of legislation.⁶⁶ What makes this procedural pivot away from the common law even more extraordinary is that the court took this decision without soliciting any arguments, and the judgment remains silent on their reasons for doing so.⁶⁷

3.2 *The inflated-substantive reading*

The new legal question allowed the court to apply (more effortlessly⁶⁸) the earlier judgment of *Jaftha v Schoeman*.⁶⁹ This judgment is discussed in chapters four and five, but, to recapitulate, *Jaftha* declared unconstitutional a statutory provision for failing to allow judicial oversight and discretion over the execution of a judgment debt against a

⁶³ *ibid* para 29.

⁶⁴ *Sarrahwitz v Maritz*, Case CCT 93/14, Order dated 7 August 2014.

⁶⁵ *Sarrahwitz v Maritz*, Case CCT 93/14, Directions dated 8 August 2014, para 7.

⁶⁶ The court's order also defies their previous case law. The Constitutional Court has on numerous occasions held that a litigant wishing to challenge the constitutionality of a statute must plead the case from the outset of litigation, and must establish a proper basis for invalidity in both the notice of motion and pleaded facts. A belated reference in the heads of argument or oral arguments is insufficient. See *Phillips v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) paras 39–40; *Shaik v Minister of Justice and Constitutional Development* 2004 (3) SA 599 (CC) paras 24–25; *Prince v President, Cape Law Society* 2001 (2) SA 338 (CC) para 22.

⁶⁷ It was not necessary to develop the common law or review legislation in order to protect the home occupier. The insolvent trustee withdrew from the dispute (on the instruction of the other creditor who was funding the litigation). See *Sarrahwitz v Maritz*, Case No 93/14, Affidavit of Hermanus Maritz, signed 16 October 2014. As there was no longer any opposing claim, the court could have merely ordered the transfer of ownership.

⁶⁸ This claim is explained in section 4 below.

⁶⁹ *Jaftha* (n 2).

home. The decision is widely cited as the leading case on the negative obligation of the housing right, and it stands for the proposition that the negative component of the right must be afforded an expanded interpretation. That is, the obligation protects both procedural and substantive interests and the ambit of protection is not confined to evictions.⁷⁰ The net of section 26 is cast wide enough to protect against the loss of an ownership or contractual right if that common law right is used to secure access to an adequate home. The *Jaftha* judgments records four reasons for adopting an expanded scope of the right (at least in the context of legislation).⁷¹

First, the housing right advances human dignity.⁷² The ability to live in your own home is amongst the most dignifying human experiences. Even if the home is simple and perhaps even inadequate, enjoying the comfort of a personal space in which to reside increases self-worth. This is because a home does not only secure the basic human need for shelter. The walls of a home carve out for each person a sphere of privacy in a tumultuous world, which fosters the conditions required for the cultivation of our most intimate human relationships.⁷³

Second, international law requires more than a procedure.⁷⁴ South Africa is a signatory to the International Covenant on Economic, Social and Cultural Rights, 1966, and article 11(1) of the ICESCR enshrines the right to adequate housing.⁷⁵ In the General Comment on ‘The Right to Adequate Housing’, the United Nations Committee on

⁷⁰ *ibid* para 13 (the court effectively rejected the reasoning of the high court that section 26 of the Constitution is not infringed by the loss of an ownership right).

⁷¹ The analysis of the four reasons is adapted from my earlier work in Michael Dafel, ‘Curbing the Constitutional Development of Contract Law’ (2014) 131 *South African Law Journal* 271.

⁷² Constitution ss 1(a), 10 (the Constitution lists human dignity as a foundational value of the South African constitutional order, and also guarantees the right of each person to have their human dignity respected and protected). See *Grootboom* (n 2) para 23 (‘there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to those who have no food, clothing and shelter’).

⁷³ On the connection between the right to privacy and the home, see *Mathale v Linda* 2016 (2) SA 461 (CC) paras 36–37; *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) paras 47–48; *Residents of Joe Slovo Community v Thubelisha Homes* 2010 (3) SA 454 (CC) para 354; *NM v Smith* 2007 (5) SA 250 (CC) paras 132–34; *Bernstein v Bester* 1996 (2) SA 751 (CC) para 67. In *Port Elizabeth Municipality* (n 3) the court held at paragraph 17 that a home—

is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world.

⁷⁴ Constitution s 39(1)(b) (courts must consider international law when interpreting the provisions of the Bill of Rights).

⁷⁵ UN General Assembly, *ICESCR*, 16 December 1996, United Nations Treaty Series, vol 993 page 3.

Economic, Social and Cultural Rights wrote that a core aim of the negative component of the right is to protect security of tenure. This conception of the right means that article 11(1) does not stop at prohibiting arbitrary evictions.⁷⁶ Security of tenure includes the ‘right to live in security, peace, and dignity’.⁷⁷ Adopting the view of the General Comment, the *Jaftha* court recognised the ‘need not to give the right to housing a restrictive interpretation’⁷⁸. This flows from the fact that in a market economy individuals secure their housing tenure through a combination of ownership and contractual rights. The rules that govern these legal relationships — many of which are found within private law — should therefore reflect the need to afford each person a sufficient amount of protection to ensure uninterrupted access to an adequate home. The court quoted the General Comment:

Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informational settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of tenure which guarantees legal protection against forced eviction, harassment and other threats.⁷⁹

Third, the reasons a person may become an ‘unlawful’ occupier is not inevitably due to acts of greed, recklessness, or a general disregard for the law or the rights of others.⁸⁰ Poverty is the problem. Unlawful occupiers are often the most financially vulnerable individuals in society, and their occupation of another person’s property is usually on account of enjoying no viable alternative. Their vulnerable position stems not only from a lack of income and savings. Indigent persons lack a sense of meaningful autonomy. Their weak economic status means that they are unable to conclude credit agreements with financial institutions, and, in some instances, they are at risk of being subjected to cruel and selfish acts of exploitation.⁸¹ Instead of penalising their actions, their impoverished financial situation requires the law to treat them with compassion and assistance. The painful reality is that many individuals have no real option but to enter commercial agreements in order to secure access to a home. They do so knowing the

⁷⁶ UNCESCR, *General Comment No. 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, 13 December 1991, E/1992/23.

⁷⁷ *ibid* para 7.

⁷⁸ *Jaftha* (n 2) para 24.

⁷⁹ *ibid*.

⁸⁰ *ibid* para 30.

⁸¹ *ibid*.

immense difficulty that they will have in complying with their agreements, and as well as the consequences that will flow should they fail to meet their undertaking. Many of the cases litigated before the courts reflect this experience. As the *Jaftha* court noted, what ‘is a really a welfare problem gets converted into a property one’.⁸²

Fourth, there is no pressing need to restrict the scope of section 26 in the abstract. Constitutional rights adjudication in South Africa is, for the most part, composed of two stages. It commences with rights interpretation, and, if a violation of the right is found, the adjudication moves to investigating whether the infringement is justifiable. The advantage of the two-stage approach is that courts are at liberty to interpret rights broadly. Any legitimate reason to limit the protections of the housing right can rather be justified in accordance with the section 36 rights limitation analysis.⁸³ It will therefore be left to the individual circumstances of each case to determine the extent to which a law of general application should permit the reasonable and justifiable limitation of the right.

Sarrahwitz applied the *Jaftha* holding, and the court once more afforded the right a wide interpretation (in the context of a legislative framework). The court reaffirmed that any measure (including those that are taken by private actors) that deprives a person from existing access to their adequate home is a violation of right. Echoing the reasoning in *Jaftha*, the wide interpretation is necessitated due to the social reality of South Africa. The high levels of poverty and homelessness, the inability of the poor to secure home loans, and the importance of having a home all point towards providing as much protection as possible to individuals who already enjoy access to a home.⁸⁴ The negative obligation therefore does not just protect against arbitrary evictions. The right is also violated, the court continued, when a measure would ‘effectively’ render a person homeless.⁸⁵ In this matter, the exercise of the insolvent trustees’ common law powers was such a measure. Mrs Sarrahwitz was unemployed and had little prospects of raising a new source of income. The refusal to transfer ownership meant that in time she would be left without a place to reside, which is a situation that is made even more shocking given that she had paid the full purchase price.

⁸² *ibid.*

⁸³ Constitution s 36.

⁸⁴ *Sarrahwitz* (n 2) para 46.

⁸⁵ *ibid* para 45.

Sarrahwitz departs from *Jafitha* in one material respect. Whereas the *Jafitha* court required the housing right to be judicially weighed against competing interest within the particular circumstances of the case, the *Sarrahwitz* court was prepared to elevate the housing right over other competing rights. The *Sarrahwitz* judgment reasoned that it is ‘difficult to conceive of an instance where the refusal to transfer a home to a vulnerable purchaser, who has paid the purchase price in full, coupled with real risk of becoming homeless, would not outweigh the advantage to creditors of the seller’s insolvent estate’.⁸⁶ The negative component of the housing rights automatically trumps all other concurrent claims on the estate. The court provided this group of vulnerable occupiers an uncommon feature in court’s jurisprudence on the application of constitutional rights to private legal relationships: a fixed right.

The remedy requires noting. In what may be fair to label as one of the most extensive ‘reading-in’ to a statute in its history, the court cured the under-inclusiveness of the Land Act by severing two words and adding no less than 76 new words to the Act.⁸⁷ The cumulative summary of these amendments means that any vulnerable occupier, which the court defined as ‘a purchaser who runs the risk of being rendered homeless by a seller’s insolvency’, who entered into a contract of sale for the acquisition of a residential property, and has paid the purchase price in full within one year from the conclusion of the contract, may demand transfer of the property in the event of the seller’s insolvency. The striking extent to which the court altered the scope of the legislative scheme is made appreciable by the fact that the court had to delete ‘on instalments’ from the legislative chapter heading. In accordance with the new provisions to the Land Act, the court ordered the insolvent trustee to transfer ownership of the property to Mrs Sarrahwitz.

⁸⁶ *ibid* para 64.

⁸⁷ The minister conceded that the Act was unconstitutional and proposed much of the wording that the court ultimately inserted into the Act. Not too much should be read into this concession, however. The minister is primarily responsible for implementing (and defending) the Land Act. It is questionable whether a minister can concede so much without the approval of either cabinet or the legislature. This is particularly the case given that the concessions of the minister meant that main purpose of Chapter 2 of the Land Act was altered. The legislative chapter was initially promulgated to protect one type of vulnerable home purchasers and not another. The judgment mentions that the initial legislative purpose was to extend protection to vulnerable home purchasers, but the text of the Act does not reflect that intention. The impugned provisions rather formed part of a much larger legislative framework aimed at regulating all instalment sale agreements of residential properties, regardless of the wealth of the purchaser.

The *Sarrahwitz* judgment contains no hints as to why the court felt compelled to convert a plea for the development of the common law to the judicial review of legislation. The decision to substitute the cause of action was made in chambers, and the judgment offers no explanation for the procedural pivot away from the common law. In fact, the judgment fails to disclose that it was the members of the court that raised the legal question upon which case was decided. The court's decisions makes more sense however when viewed against their earlier decision in *Maphango*, and the debate that erupted in the Constitutional Court and Supreme Court of Appeal over how expansively the scope of the negative obligation should be interpreted when applied to the common law.

4 Maphango v Aengus Lifestyle Properties

The matter stemmed from a decision of a landlord to terminate residential lease agreements with the sole aim of securing higher rentals. Following renovations to an apartment building located within the inner city of Johannesburg, which was supported with subsidies received from the state, the landlord believed that it was financially necessary to increase the rent payable on each of the existing lease agreements by between 100 to 150 per cent. The drastic increase, the landlord calculated, was necessary to cover the costs of the renovations and realise an appropriate rate of return on the investment. The immediate problem with this financial strategy was that the lease agreements contained rent-escalation clauses. The agreements limited the annual increase to 15 per cent. To circumvent the rent-escalation clauses, the landlord terminated the lease agreements. This was done pursuant to a provision in the agreements that allowed either the landlord or tenant to terminate the agreements on reasonable notice. The landlord thereafter offered new lease agreements to the tenants. The new agreements were materially no different to the terminated agreements, except that the rent more than doubled. The tenants refused to sign the new agreements. A large majority of the tenants were financially vulnerable, and faced the prospect of becoming homeless as they could not afford the increased rentals. The tenants' refusal to accept the new agreements led the landlord to institute an application for their eviction.⁸⁸

⁸⁸ The section adopts the analysis outlined in Dafel (n 71).

The tenants defended the application on the ground that the lease agreements were not lawfully terminated, and, as a result, they were not unlawful occupiers. The crux of the argument was that the termination of a lease agreement given the particular circumstances of the case was contrary to public policy, and, accordingly, unenforceable. The argument was built on the housing right. The tenants contended that the decision to terminate a lease agreement for the sole purpose of increasing the rent violated section 26(1) of the Constitution. The infringement of the right, in turn, rendered the exercise of the contractual power against public policy. The argument was somewhat convoluted, but, in essence, the tenants argued that section 26(1) of the Constitution should restrict the bare contractual power of a landlord to cancel a residential lease agreement. To understand why this argument enjoyed prospects of success, it is necessary zoom out from the *Maphango* matter for a moment and expand upon the discussion in chapter four that details the impact of the Constitution on the common law of contract.

4.1 *The impact of the Constitution on contract law*

Chapter four illustrated how the Constitution expanded the public policy enquiry to incorporate the extrinsic-based test. This prong of the test focuses on the results that flow from enforcement, which requires courts to assess whether circumstances that are external to the contract caused a result that is inimical to public policy (which includes infringement upon constitutional right norms).⁸⁹ Though it is unclear to what extent the threshold of the public policy enquiry has grown, it bears pointing to the high watermark of the Constitutional Court's jurisprudence on the capacity of constitutional values to deny the enforcement of an otherwise objectively valid contractual provision. In the matter of *Botha v Rich*, the parties concluded an agreement for the sale of commercial land.⁹⁰ The purchaser undertook to pay the purchase price over sixty monthly instalments. The seller would in turn transfer ownership of the property once the full purchase price had been paid. The agreement also provided that if the purchaser fell into breach of contract, the seller would be entitled to cancel the agreement, and, as a penalty, the purchaser would forfeit to the seller all of the payments that had been effected under the agreement.

⁸⁹ For an example of how the access to adequate housing right informs the intrinsic-based prong of the public policy enquiry, see *Mottel v Altmarr Properties* [2013] ZAWCHC 115, unreported judgment, 20 June 2013.

⁹⁰ 2014 (4) SA 124 (CC).

The purchaser paid approximately three-quarters of the purchase price over a period of three and a half years, but subsequently defaulted on the monthly instalments for more than sixteen months. During this period, and while remaining in breach of the agreement, the purchaser requested the seller to transfer the property in accordance with section 27(1) of the Land Act.⁹¹ The statutory provision aims to enhance the protection of land purchasers, and it permits the purchaser to demand the transfer of ownership if at least half of the purchase price has been paid. Sellers are also protected: the provision provides that the transfer of ownership is conditional on the registration of a mortgage bond over the property to secure the balance of the purchase price and interest due.⁹² Section 27(1) therefore only affords a partial benefit to a purchaser. Though ownership is transferred, the property remains liable for immediate execution should the purchaser fail to pay the instalments.

The seller ignored the request for transfer. Eight months later, and after the seller demanded payment of the arrear instalments, the purchaser offered to pay all of the outstanding amounts. The tender was however conditional on the transfer of property onto her name. The seller once more did not respond to the request for transfer. Instead, and relying on the right to terminate in the event of breach, the seller instituted proceedings in the high court for an order declaring the contract cancelled.⁹³ The purchaser defended the action, and argued that it would be contrary to public policy, and consequently unenforceable, to enforce the cancellation clause given the circumstances of the case. The purchaser thus relied on the extrinsic-based prong of the public policy enquiry. It was argued that the a contractual power to cancel an agreement ought not be enforced in a situation where the purchaser had (i) paid more than half of the purchase price, (ii) would not be entitled to claim any restitution for the payments already effected due to the forfeiture clause, and (iii) demanded the transfer of property pursuant to the statutory right afforded by the Land Act but nevertheless refused by the seller. In addition to the defence, the purchaser instituted a counter-application, and requested an

⁹¹ Land Act (n 51).

⁹² *Botha* (n 90). This is the interpretation of the Constitutional Court, which differs from that of the Full Court of the High Court. The Constitutional Court held that section 27(1) of the Land Act should be interpreted in accordance with section 39(2) of the Constitution, and accordingly held that their interpretation of the provision is ‘consistent with the object of our Constitution that contracting parties are treated with equal worth and concern’.

⁹³ Unless communicated prior to issuing a summons, and provided that the contract does not prescribe a different procedure, cancellation of a contract takes effect from the service of the summons or notice of motion. See *Swart v Vosloo* 1965 (1) SA 100 (A) at 112F–G; *Middelburgse Stadsraad v Trans-Natal Steenkool Korporasie* 1987 (2) SA 244 (T) at 249A–G.

order directing the seller to transfer the property in accordance with section 27(1) of the Land Act. The Full Court of the High Court dismissed both the defence and the counter application. It found that the enforcement of the cancellation clause was not against public policy. The exercise of the contractual right to cancel was neither unreasonable nor unfair, and it violated no other right.⁹⁴ The high court declared the contract cancelled (which meant the seller retained ownership and the three-quarters of the purchase price already paid). The SCA dismissed an application for leave to appeal.

A unanimous Constitutional Court overturned the high court decision. The Constitutional Court held that section 27(1) of the Land Act is a ‘contractual right implied by law’, and, as a result, the statutory provision did not rebut the presumption that obligations in a bilateral contract are reciprocal.⁹⁵ This interpretation is important, as the provision does not superimpose a statutory right over the contractual rights of the parties. A purchaser of land is therefore only permitted to exercise the ‘implied’ contractual right if they were not themselves in breach of contract. A purchaser could not demand transfer in accordance with section 27(1) of the Act until all arrear instalment payments were paid. This was the situation before the court. The purchaser remained in breach, and, accordingly, the seller was under no obligation to transfer the property. This was not the end of the matter however.

The court proceeded, in effect, to apply a new contractual defence. All law, including the common law of contract, is subject to constitutional control. Judicial and academic writing on this topic has, for the most part, been confined to investigating the extent to which constitutional rights (or values) restrict the private power to contract. The *Botha* judgment reframed the debate. The starting point is not whether a particular constitutional right may nullify an obligation voluntarily undertaken. In other words, the primary purpose of constitutional rights should not be viewed as a means restrict the power of contract. On the contrary, the law of contract is a legal instrument that promotes the realisation of core constitutional values. The protection of human autonomy is at the centre of our constitutional order, and the law of contracts is a tool that enables individuals to choose how best to advance their own interests. The corollary of the freedom to pursue is responsibility for our decisions, and the law should therefore give effect to contractual undertakings. The protection of autonomy is also not the only

⁹⁴ *Rich v Botha* [2009] ZANHC 68, unreported judgment, 13 November 2009, paras 24, 29–30.

⁹⁵ *Botha* (n 90) para 37.

applicable constitutional value. Contracts are not purely individualistic acts. The act of concluding a contract, and thereafter the performance of undertaken obligations, is also a means to respect the dignity, freedom, and equal worth of our contracting parties.⁹⁶ Contracts serve to mutually enhance the position of both parties. When viewed through the prism of the Constitution, the court held, the underlying assumption of contract law is that parties conclude agreements in good faith and that they do so in order to obtain benefits from one another.⁹⁷

The performance of contractual obligations therefore promotes the realisation of constitutional values, and courts will accordingly enforce contractual undertakings. The principle of reciprocity — that is, a contracting party does not need to perform until the other party has met their undertakings — gives effect to the underlying value of good faith at the time of enforcement.⁹⁸ The principle of reciprocity cures selfish acts, as it ensures that individuals do not pursue their own contractual interests without regard to the interests of the other party.⁹⁹

The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others.

The court recognised however that the 'rigid' application of the principle of reciprocity may in some instances lead to an injustice.¹⁰⁰ That is, the enforcement of an agreement may undermine the underlying value of good faith. If this should happen, the court concluded, the principle of good faith requires a flexible application of the principle of reciprocity to ensure fairness between the parties.¹⁰¹ *Botha* was such an instance. The rigid application of the principle of reciprocity in this case, a unanimous court concluded, would result in a disproportionate sanction. The purchaser would lose the property, and forfeit the three-quarters of the purchase price paid. The effect of permitting the seller to cancel the contract would also deprive the purchaser the right to transfer of the property under section 27(1) of the Land Act, and in the process cure the breach of contract. The

⁹⁶ *ibid* para 46.

⁹⁷ *ibid* para 24.

⁹⁸ *ibid*.

⁹⁹ *ibid*.

¹⁰⁰ *ibid* para 45.

¹⁰¹ *ibid*. The court supported this view with the pre-Constitution decision of *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) at 651E–F, 652C–G.

court directed the seller to transfer the property, provided that all arrear amounts are paid and a mortgage bond is registered.

The *Botha* judgment is not clearly reasoned, and it is difficult to articulate the precise doctrinal rule.¹⁰² The effect of the judgment is however clear from the outcome. The court condoned a breach of contract. Not only was the breaching party offered an opportunity to rectify the non-performance, the court prevented the innocent contracting party from exercising a contractual right to cancel the contract, and, in doing so, precluded the innocent party from benefiting from a penalty clause. The principles applied in this matter altered a central component of contract law: namely, that each person should be held to their bargain and the liabilities that flow from non-performance. If the consequences of the breach would lead to a ‘disproportionate’ result, the *Botha* judgment suggests, a party may well escape at least some of that liability.¹⁰³ It is difficult to predict at this stage how this case will be applied in future matters. Nevertheless, *Botha* illustrates willingness on the part of the Constitutional Court to challenge the assumptions and policies on which pre-Constitution public policy test is premised, and to remodel the rules of contract law in order to meet constitutional norms.

4.2 *The deflated-procedural reading*

The *Botha* judgment suggests that the *Maphango* tenants enjoyed similar prospects of success. They too requested the courts to restrict the bare power to terminate a contract. To recap, the tenants accepted that the termination clause was not in itself a violation of public policy. Their application was grounded on the second prong of the test, arguing that the external circumstances in which the landlord exercised the power to terminate violated public policy. The decision to terminate the lease agreements was motivated solely by the want to escape the rent-escalation clause, which is an act that frustrated the tenants’ expectation to a less than 15 per cent increase in annual rent. The landlord also made no attempt to negotiate with the tenants, nor did the landlord request a fair increase in rentals in accordance with rental housing market legislation.¹⁰⁴ The landlord’s decision was unilateral, and was a far cry from the *Botha* court’s articulation of the good faith

¹⁰² For a critique of the decision, see Deeksha Bhana and Anmari Meerkotter, ‘The Impact of the Constitution on the Common Law of Contract’ (2015) 132 *SALJ* 494, 506–08 (contractual fairness as a defence to non-performance is too vague for consistent application).

¹⁰³ *Botha* (n 90) para 51.

¹⁰⁴ Rental Housing Act 50 of 1999 (RHA).

contracting parties are expected to show one another. The tenants added further constitutional force to the public policy argument. They argued that the enforcement of the termination clause would infringe upon their section 26 housing right. Owing to the fact that they could neither afford new rentals nor secure an apartment of a similar standard, the termination of the agreement would result in homelessness or a severe retrogression in their socio-economic status. The negative component of the housing right therefore necessitates the development of the common law in order to restrict the bare power of a landlord to terminate a lease agreement. The tenants therefore appealed to the expanded reading of the obligation. In the particular factual matrix of their case, the tenants maintained that their interests to enjoy secure access to an adequate home outweighed the economic interests of the landowner.

The Supreme Court of Appeal accepted each individual step of the tenants' argument as correct: section 26 prohibits private individuals and entities from interfering with the security of tenure of another person, and that contractual provisions that are inimical to constitutional values are unenforceable.¹⁰⁵ The SCA rejected the conclusion however. In a unanimous judgment, the SCA held that the act of terminating a lease agreement — whether performed pursuant to a power provided for in a contract or the residual rules of the common law — does not infringe the section 26 housing right. The SCA reasoned that a tenant only enjoys security of tenure during the period prescribed in the lease agreement (or, if no period is prescribed, until reasonable notice is given). A tenant has no legal security of tenure outside the terms of the contract.¹⁰⁶ The SCA therefore equates security of tenure provided in a contract with the security of tenure safeguarded by the Constitution. It was on this point that the SCA distinguished the matter from *Jaftha*. That decision, unlike the matter at hand, pertained to the right of an owner. Ownership entails possession, and security of tenure, for an indefinite duration. A lease agreement is different. Leases entail possession only until the contract is terminated in accordance with the agreed-upon provisions of the contract or the rules of common law. The SCA therefore concluded that the tenants' security of tenure was 'circumscribed by the leases themselves' and that it therefore could not be claimed that termination in accordance with the leases constituted an infringement of the tenants' right to secure tenure.¹⁰⁷ The practical effect of the SCA's reasoning is that section 26 of the

¹⁰⁵ *Maphango* (SCA) (n 2).

¹⁰⁶ *ibid* para 29.

¹⁰⁷ *ibid*.

Constitution provides no additional safeguard outside the terms of the contract. This is a narrow-procedural reading of the obligation. The SCA thus followed their earlier reasoning in *Brisely*. The housing right only safeguards pre-existing common law rights. Section 26 adds nothing more. This is even the case if the cancellation leads to a significant retrogression of a person's socio-economic status, including homelessness.

The reasoning of the SCA is difficult to reconcile with *Jaftha*. The *Jaftha* decision simply does not support the claim that a tenant's constitutional right to security of tenure is tied to either the lease period or ownership. The *Jaftha* court only discussed ownership because the impugned provision in that matter authorised the execution of immovable property (and, for most people, immovable property is limited to residential property). The loss of ownership was not the problem in *Jaftha*, and nothing in the court's broad interpretation of section 26 depends on the occupier owning the property.¹⁰⁸ Simply put, section 26 does not protect ownership. The entire purpose of the housing right is to ensure that the security of tenure of a home is protected, regardless of the context in which that home is enjoyed. This may include instances where the occupier owns the property, but extends to other instances including occupation without any private law right. Indeed, a primary aim of section 26 is to afford a certain degree of tenured protection to unlawful occupiers whom have settled and build makeshift houses on land that does not belong to them.

The SCA's reasoning is difficult to accept for an additional reason. The suggestion that the tenants 'circumscribed' their own security of tenure implies that individuals are permitted to waive away the exercise of their constitutional rights.¹⁰⁹ A distinction must be kept between the security of tenure that a contract affords and the security of tenure that section 26 guarantees. The latter is a more expanded protection, and, in accordance with constitutional supremacy, may trump contractual rights. Constitutional security of tenure is independent from the security of tenure a contract affords, but the reverse of this relationship is not true. The cancellation of a contract may bring to an end the security of tenure rights stipulated in the contract, but it does not terminate your section 26 guarantees. On the converse, however, the cancellation of a

¹⁰⁸ *Jaftha* (n 2) para 24.

¹⁰⁹ See Stu Woolman, 'Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeshka Bhana on *Barkhuizen*' (2008) 125 *SALJ* 10, 13–14 (right holders cannot waive away their constitutional rights, and therefore individuals cannot contract the scope of a constitutional rights; courts may however interpret a constitutional right not to prohibit a type of private conduct, which accordingly would private individuals and entities to impose contractual restrictions on others).

lease agreement may cause the invocation of the housing security rights in terms of section 26. This is precisely what the tenants in *Maphango* sought to do. The SCA failed to appreciate this distinction. Their failure is perplexing because the Constitutional Court has instructed lower courts not to presume that contractual provisions have simply waived away the security of tenure protections of section 26. In *Gundwana v Steko Development*, for example, a unanimous court held that contracting parties do not waive away their section 26 rights upon concluding a mortgage agreement.¹¹⁰

4.3 *The inflated-substantive reading*

The tenants appealed to the Constitutional Court. They contended that the SCA's conclusion that section 26 does not limit the common law power of contract in residential lease agreements is incorrect. Despite the fact that the reasoning of the SCA stands on shaky legs, the majority of the Constitutional Court in *Maphango* opted not to respond to this legal question, and, in doing so, left the holding of the SCA as the black-letter law position on the matter. Instead, and once more, the court reformulated the legal question. The pertinent question for resolution, the majority held, was whether the Rental Housing Act (RHA) restricts the contractual power of a landlord to cancel a lease agreement.¹¹¹

The RHA is the principle legislative scheme for the regulation of the rental housing market, and the majority of the court read the Act as forming part of the constitutional obligations upon the state to realise progressively the right to access adequate housing.¹¹² The Act defines the responsibilities of both the national and provincial governments, including their functions to increase the availability of affordable rental housing in the private market. The Act also crystallises the duty upon the state to protect constitutional rights from undue interference by private individuals and entities. The RHA enumerates an extensive list of statutory rights for both contracting parties. The lessee, for instance, is entitled to demand that the lease is reduced to writing.¹¹³ Written leases must also stipulate the amount of rent to be paid, as well as the reasonable escalation of the rent.¹¹⁴ Further provisions are made for the right to request a deposit, the

¹¹⁰ 2011 (3) SA 608 (CC) para 44. Although *Gundwana* investigated a different sort of contract, the underlying principle in this matter applies to lease agreements as well.

¹¹¹ RHA (n 104).

¹¹² *Maphango* (CC) (n 2) para 34.

¹¹³ RHA s 5(2)

¹¹⁴ *ibid* s 6(c).

qualified right to inspect the premises, and the right to reclaim incurred expenditures and inflicted damages.¹¹⁵ The Act further preserves the common law right of a landowner to terminate the lease. This right is however subject to an important caveat. The RHA prohibits a landlord from exercising a contractual power to cancel on grounds that constitute an ‘unfair practice’.¹¹⁶ The legislative framework defines ‘unfair practice’ in wide terms. It encompasses any ‘act or omission by a landlord or tenant in contravention of the Act’ and any other ‘practice prescribed as unreasonably prejudicing the rights of interests of a tenant or a landlord.’¹¹⁷ Pursuant to the definition, the Gauteng provincial government prescribed ‘unfair conduct’ to include any act or omission that is ‘oppressive or unreasonable’.¹¹⁸ The formulation of the ‘unfair practice’ definition, the majority of the court emphasised, meant the legislative framework protects far more than just established statutory or common law rights. The RHA protects those interests that encompass the general wellbeing of tenants and landlords. The enquiry into whether an unfair practice is present therefore requires consideration into whether the impugned conduct negatively impinges upon any benefits, advantages, or securities currently enjoyed by either contracting party.¹¹⁹ The legislative translation of the right follows the more expansive reading of the housing right, as the RHA restricts the otherwise bare contractual power to cancel a lease agreement.

The Act is enforced through provincial housing tribunals, and all disputes pertaining to an ‘unfair practice’ must be resolved through these administrative forums.¹²⁰ Each provincial tribunal is composed of three to five members. They are appointed by the provincial executive, and must be experienced in the management of property, consumer, and housing development matters.¹²¹ The RHA also empowers the housing tribunal to follow a flexible procedure. The tribunal may require the parties to first

¹¹⁵ *ibid* s 5(3).

¹¹⁶ *ibid* s 4(5)(c).

¹¹⁷ *ibid* s 1.

¹¹⁸ Rental Housing Tribunal Procedural Regulations Notice 4003 of 2001 and Gauteng Unfair Practice Regulations Notice 4004 of 2001, both in Provincial Gazette Extraordinary No 124 of 4 July 2001.

¹¹⁹ *Maphango* (n 2) paras 52–53.

¹²⁰ RHA s 13(9).

¹²¹ RHA s 9(1).

attempt mediation before a complaint is heard. The tribunal may also instruct inspectors and information officers to report on any matters relevant to a complaint.¹²²

Upon finding the existence of an unfair practice, the housing tribunal is afforded wide remedial power to make any order that is ‘just and fair to terminate the unfair practice’.¹²³ This includes, but is not limited to, orders that seek to discontinue overcrowding, unacceptable living conditions, and exploitative rentals.¹²⁴ The tribunal is also empowered to determine a new rent amount. This calculation must be done in a manner that is just and equitable to both the tenant and the landlord and takes due cognisance of: (i) prevailing economic conditions of supply and demand; (ii) the need for a realistic return on investment for investors in rental housing; and (iii) incentives, mechanism, norms and standards and other measures introduced by government in terms of the policy framework of rental housing referred in section 2(3).¹²⁵ The findings of the tribunal constitute an order of a magistrates’ court,¹²⁶ and may be taken on judicial review.¹²⁷

The *Maphango* court justified the pivot to the RHA on the basis that the tenants had in fact sought to protect their interests through the mechanisms of the Act. Following the landlord’s decision to cancel the lease agreements, but before the landlord instituted eviction proceedings, the tenants lodged a complaint of an ‘unfair practice’ with the Gauteng Rental Housing Tribunal. The tenants withdrew their complaint after the landlord instituted the eviction application. They believed this move was necessary to focus their financial resources and efforts to defending the eviction application. Despite their withdrawal, however, the majority of the Constitutional Court concluded that the Tribunal’s determination as to whether the landlord’s termination of the agreements for the sole purpose to secure higher rentals constituted an unfair practice is a relevant consideration that a court should have regard to during an eviction application. The high court ought to have postponed the hearings to permit the Tribunal to make such a finding. The court consequently remitted the matter back to the Housing Tribunal. In defending this pivot away from the common law, the court conceded that none of the parties fully

¹²² RHA ss 13(2)–(3).

¹²³ *ibid* s 13(4).

¹²⁴ *ibid* s 13(4)(2)(c).

¹²⁵ *ibid* s 13(5).

¹²⁶ *ibid* s 13(13).

¹²⁷ *ibid* s 17.

appreciated the relevance of the RHA to their dispute. But, as a principle of the rule of law, courts are not permitted to decline the application of statutes, as it would permit litigants to ignore applicable legislation.¹²⁸

In one sense, however, the revision of the legal question is problematic. It bears emphasising that the parties never requested an order that the matter be remitted to housing tribunal (the tenants merely argued that it was against public policy for the lessor to cancel an agreement for the sole purpose of securing higher rentals given that the lessor had the opportunity to request a redetermination of the rent with the housing tribunal). The parties also did not ignore the RHA. Though the Tribunal is exclusively empowered to entertain allegations of an ‘unfair practice’, a contracting party is not required to resolve their dispute through the housing tribunal should they have an additional cause of action.¹²⁹ In fact, although the RHA is a more simplified and cost-effective dispute resolution mechanism, there are good reasons for why a tenant or landlord would want to avoid the RHA. The administrative tribunal is composed of non-judges, and their decision is not subject to appeal.¹³⁰ If their pleaded arguments had succeeded, the tenants would have been entitled to an immediate (and stronger) substantive relief. The RHA may also prove to be cumbersome process swamped down by extra-legal considerations. The facts of *Maphango* illustrate this point. After the landlord institute an eviction application, the tenants were forced to defend the application before the high courts. Here, they raised the argument that the common law was unconstitutional. This was a legal argument, and the court should have pronounced itself. The majority of the court rather prolonged the process by remitting the matter back to the housing tribunal where the matter originally started. This is a route that the tenants strategically opted to avoid. They declined to raise the argument of res judicata (the eviction application should be postponed until the Housing Tribunal has adjudicated the matter), and rather elected to plea for the development of the common law.¹³¹ It is therefore difficult to resist viewing the court’s decision as a tactical move to direct how the jurisprudence on this matter should develop.

¹²⁸ *Maphango* (CC) (n 2) para 48. See also RHA s 17.

¹²⁹ RHA s 13(1), read with ss 13(9)-(10). (A landlord or tenant may lodge a complaint; though only an established tribunal has jurisdiction to entertain a complaint of ‘unfair practice’, there is nothing in the Act to suggest that other remedies are excluded).

¹³⁰ See *Young Ming Shan v Chagan* 2015 (3) SA 227 (GSHC).

¹³¹ *Maphango* (CC) (n 2) para 15. The tenants had initially raised this defence in a prior application, but opted not to raise it again, opting instead to request the development of the common law.

4.4 Legislative policy

The *Maphango* court's pivot away from the common law has been defended as an act of comity, a decision that shows respect to the choices of the legislature.¹³² The argument goes that the legislature is the principle institution responsible for law-reform, and, as such, the courts should not unduly undermine the legislature particularly in policy complex matters like monetary issues and the management of limited economic resources.¹³³ For reasons that are explained in chapters 8 and 9, there are problems with this argument.¹³⁴ At this stage, the only point that needs noting is that *Maphango* is an outlier to the court's general position on which institution is responsible for developing the common law of contract in line with constitutional norms. There appears to be no other contract dispute where the court strategically pivoted towards legislative remedies. In fact, in the *Botha* judgment, which is the high water mark for the extrinsic-based prong of the public policy enquiry, the Constitutional Court ignored legislative policy. The common law of contract permits parties to include forfeiture clauses in their agreements. In accordance with the Conventional Penalties Act, however, a court is empowered to reduce the penalty to an amount that it considers 'equitable in the circumstances' if it appears the penalty is 'out of proportion to the prejudice suffered'.¹³⁵ The onus to prove the penalty clause as excessive falls on the debtor, but the courts retain a discretionary power to reduce the penalty of their own accord.¹³⁶ Despite the availability of a legislative remedy to mitigate the effects of the penalty, the *Botha* court was satisfied to apply a new defence within the common law of contract. The court's decision to avoid this legislative remedy is striking because the application of the Conventional Penalties Act would have resulted in less of a disturbance to the common law of contract; the court

¹³² Frank Michelman, 'Expropriation, Eviction, and the Gravity of the Common Law' (2013) 24 *SLR* 245, 259–61.

¹³³ *Mighty Solutions* (n 55) paras 39, 44; *Carmichele* (n 54) para 36.

¹³⁴ Chap 8, sec 1.

¹³⁵ Conventional Penalties Act 15 of 1962, s 3.

¹³⁶ See *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SCA) para 8; *Chrysafsis v Katsapas* 1988 (4) SA 818 (A) at 828I; *Magna Alloys and Research v Ellis* 1984 (4) SA 874 (A) at 906D–F; *Smit v Bester* 1977 (4) SA 937 (A) at 942D–943A. See also *Shirley v Virginia Trust* 1978 (2) SA 357 (T) at 362B–E; *Maiden v David Jones* 1969 (1) SA 59 (N) at 63B–64C.

could have enforced the right of the innocent party to cancel the contract but reduce the penalty amount to lessen the ‘disproportionate’ impact on the breaching party.¹³⁷

In addition to ignoring available legislation, the *Botha* court’s development of the common law appears to stand in contrast to the position of the legislature. In 2001, and in response to certain sectors of the South African legal community believing that the power of courts to invalidate unfair contracts should be widened, the Law Commission published a draft bill that recommended bestowing on all courts a general discretion to amend or rescind any contractual provision if the enforcement of the provision led to an ‘unreasonable, unconscionable or oppressive’ outcome.¹³⁸ The proposed bill was criticised. It was argued that such wide judicial discretion would not only lead to uncertainty and inconsistent application, but it would also frustrate the expectations of the contracting parties.¹³⁹ The legislature consequently ignored the proposed the Bill. Instead, the legislature adopted a more a piecemeal strategy. Post-1994, legislative policy has been to regulate particular contracts within their own specific legislative framework.¹⁴⁰ These legislative schemes often bestow a degree of discretion on the courts to nullify oppressive contracts. The exercise of the discretion is however limited, as the power to invalidate a contract or alter the expectations of the contracting parties must be made within the context and parameters of the statute. The courts are required to be sensitive to the policy objectives of the act, which includes how the legislative scheme aims to favour and burden different groups of individuals.

¹³⁷ In *Botha*, the seller argued that the purchaser could have applied for a reduction in accordance with the Conventional Penalties Act. The court dismissed the argument, suggesting that the seller should have raised this argument at the time of enforcement. This is contrary to the previous authority on this matter. See the cases discussed in note 136.

¹³⁸ SALC, *Report on Unreasonable Stipulation in Contracts and the Ratification of Contracts*, Project 47, April 1998. (The report is dated April 1998, but was made publicly available in 2001). For a brief history of the project, see FDJ Brand and Douglas Brodie ‘Good Faith in Contract Law’ in Reinhard Zimmermann and others, (eds) *Mixed Legal Systems in Comparative Perspective* (OUP 2003) 94, 115.

¹³⁹ See FDJ Brand, ‘The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution’ (2009) 126 *SALJ* 71, 77; Graham Glover, ‘Good Faith and Procedural Unfairness in Contract’ (1998) 61 *THRHR* 344.

¹⁴⁰ Brand (n 139) 77. For example, see Consumer Protection Act 68 of 2008 s 48; RHA s 4(5)(c); ESTA s 8.

5 Avoiding the common law

The Constitutional Court has yet to offer a rationale for maintaining two interpretations of the housing right, and, until the court does so, the two distinct readings of the obligation will continue to frustrate doctrinal coherence. Despite no explanation, there is a discernable pattern. The Constitutional Court has shown a strong preference for the more expanded-substantive reading, whereas the Supreme Court of Appeal (SCA) oscillates between the narrow and the expanded reading. The swing is not indiscriminate however. The jump between readings is on account of the source of law. The SCA reserves the deflated-procedural reading of the obligation for disputes adjudicated in accordance with the common law rules of private law. The more inflated reading is applied to disputes settled within a legislative framework. This dichotomy coincides with the approach of the Constitutional Court. While the court ignores the common law, the expanded-substantive reading is followed in legislative disputes. The existence of a strategy to avoid the common law is further evidenced by the fact that the court manipulates the rules of procedure, and it does so with the aim of swivelling the dispute away from the common law. The manipulation is witnessed in *Maphango* and *Sarrahwitz*. In both judgments, the court ignores the request of home occupiers to develop the common law. Instead, and acting on its own volition, the court proceeds to adjust procedural rules in order to locate a legislative remedy. It is therefore legislation, and not the common law, that grants relief to financially vulnerable home occupiers who are at risk of becoming homeless on account of the otherwise lawful actions of private individuals and entities. The substitution by the court of its own cause of action is unusual in an adversarial legal system, and the court's procedural pivot away from the common law requires a defensible explanation.¹⁴¹ Though an adequate explanation is lacking, the repeated manipulation of procedural rules is at the very least an indication that the court

¹⁴¹ *Naidoo v Sunker* [2011] ZASCA 216, unreported judgment, 29 November 2011 para 19 (a fundamental rule of fair legal procedure is that both parties must be aware of the case they are required to meet); *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) para 43; *Naude v Fraser* 1998 (4) SA 539 (SCA) at 563D–564A; *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G. See also *S v Dlamini* 1999 (4) SA 623 (CC) para 94 (in the context of a criminal case, the court wrote that the consequence of affording a high degree of autonomy to parties within our adversarial legal system is that parties must make hard choices). In the housing eviction case of *Molusi* (n 32) para 28, the Constitutional Court quoted with approval the SCA decision of *Minister of Safety & Security v Slabbert* [2010] 2 All SA 474 (SCA) para 11:

A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

intends (or feels compelled) to avoid adjudicating these disputes within the framework of the common law.¹⁴²

What are the reasons that explain the avoidance of the common law? To answer this question, it may prove useful to examine an instance where the Constitutional Court embraced the judicial law-making pathway despite political opposition. Comparing an example of avoidance to an example of embrace allows for a better assessment as to when courts deem it necessary to seek legislative assistance.

¹⁴² Both the Constitutional Court and the SCA have confirmed that they enjoy the power to raise a new issue of their own accord provided that the question of law emerges in full from the established evidence, is necessary to resolve the dispute, and causes no unfairness to the litigant affected by the judicial reframing of the cause of action. This discretionary power is employed sparingly. See *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 68; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 39; *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) para 13.

DEVELOPING THE COMMON LAW: THE RIGHT TO PARTICIPATE IN POLITICAL PARTIES

This chapter uses a dispute adjudicated under section 19(1)(b) of the Constitution — which safeguards the right to participate in the activities of a political party — as a case study to illustrate an instance where the Constitutional Court developed the common law despite political opposition.

1 Models of regulation

The extent to which public law should regulate the internal activities of political parties is a dilemma that arises in every constitutional democracy. The central function of political parties to aid in forming the democratic voice of the state necessitates that these organisations are protected by an array of political rights. The right to freedom of association, for instance, typically translates into a corresponding duty on the state not to interfere in the internal activities of political parties.¹ In the exercise of their constitutional rights, however, the actions of political parties may come to frustrate and perhaps even threaten the conditions required for a functioning democracy because the competition for political power renders these organisations and their members susceptible to acts of autocracy and political intimidation. This is the dilemma: how should a constitutional system reconcile the need to both protect and control the internal activities

¹ For example, see UNHRC, *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25 of the ICCPR)*, 12 July 1996, CCPR/C/21/Rev.1Add7, paras 8, 25–26.

of political parties? There is no clear solution. The history of human civilisation provides a plethora of examples to demonstrate the potential pitfalls of any proposed solution. It is for this reason that the question as to the extent to which a constitutional democracy should develop legal doctrine to counter the threats that political parties pose elicits a wide array of responses across the globe. They range from ‘nothing at all, even if that leads to the downfall of democracy’² to ‘everything, including the adoption of illiberal measures’.³

These two extremes can be conceptualised as two theoretical models, namely the liberal and supervisory models. Each agrees that political parties are indispensable institutions for the proper functioning of a democratic society, chief of which is to influence and form the will of government.⁴ The models diverge on how best to achieve such a result.

1.1 *Liberal model*

The liberal model believes that each political party must be afforded the absolute freedom to self-regulate. The core rationale for this approach stems from a common wisdom in democratic theory that public institutions should neither inhibit nor control political debate amongst its citizenry. Those serving in elected office have a vested and biased interest in these debates, and the perennial worry is that elected officials will employ the machinery of the state to quell dissent and opposition. In order to prevent such an outcome, the liberal model grants private individuals and entities the full liberty to speak

² US Supreme Court Associate Justice Oliver Holmes wrote that it is the role of a judge to help citizens ‘go to Hell’ if it is indeed the wishes of the ‘dominant forces in a community’ to establish an authoritarian regime. See *Gitlow v New York* (1925) 268 US 652 at 673; Letter from Oliver Holmes to Harold Laski dated 4 March 1920, reprinted in Mark DeWolfe Howe (ed), *Holmes-Laski Letters* (Harvard University Press 1953) at 248–49.

³ In the study of ‘militant democracy’, an otherwise democratic constitutional system is permitted to adopt measures that revoke the political rights of those that threaten the practice of democracy. See Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, I’ (1937) 31 *American Political Science Review* 417 at 437 (democracy must make every effort to rescue itself from fascism even if that is at the ‘risk and cost of violating fundamental principles’ of democracy and fundamental rights). See also German Federal Constitutional Court judgments on the banning of political parties, *The Socialist Reich Party Case* (1952) 2 BVerfGE 1; *The Communist Party Case* (1956) 5 BVerfGE 85.

⁴ Hans Kelsen, *General Theory of Law and State* (Harvard University Press 1945) 295. See also *Figueroa v Canada (Attorney General)* (2003) 1 SCR 912 paras 39–40 (the value of political parties to a democracy is not dependent on their capacity to offer the electorate a government; smaller parties also have the capacity to serve as vehicles for meaningful participation in the democratic process).

and organise themselves in the so-called ‘marketplace of ideas’ in order to choose policy objectives and public representatives.⁵ Each political party will therefore enjoy the unbridled autonomy to select their own internal structures, choose entry and exit criteria, and decide for themselves the best process through which the political message of the party is generated. The liberal model means that the market of political debate remains unregulated even in situations where the state benevolently believes that regulating the internal activities of political parties will increase political stability or ensure wider and fairer participation of citizens in the democratic process. The liberal model erects a strict constitutional divide between party and state, and affords the former unqualified rights to free speech and political association.

The United States best exemplifies the liberal model. The US Supreme Court has on numerous occasions invalidated legislative attempts that sought to control the internal processes of political parties.⁶ For example, in *Eu v San Francisco Country Democratic Central Committee*, the court declared invalid a state law that prohibited the governing committees of a political party from endorsing any candidate contesting an internal primary election.⁷ The court held that such a law violates the First Amendment to the US Constitution on the ground that it ‘directly hampers the ability of a party to spread its message’.⁸ The aim of the legislative scheme, which was to prevent factionalism within political parties and prevent party leaders from confusing and unduly influencing voters, was held not to be a sufficient state interest to warrant overriding the freedom to associate.⁹ This approach continued in the decision of *California Democratic Party v Jones*. Here the court struck down a referendum that would have allowed non-members to participate in the internal elections of political parties.¹⁰ The main purpose of the referendum was to ensure that the party’s candidate for public office enjoyed wide

⁵ The term was coined by US Supreme Court Associate Justice William Douglas in the decision of *United States v Rumely* (1953) 345 US 41.

⁶ See also *Tashjian v Republican Party* (1986) 479 US 208 (a state may not prohibit a political party from permitting citizens who remain politically unaffiliated from participating in primary elections); *Democratic Party v Wisconsin* (1981) 450 US 107 at 126 (a law cannot compel a state delegate of a political party who is attending a national convention to vote in a particular manner if doing so would violate the internal rules of the party). The US does not strictly adhere to the liberal model, as the Supreme Court has invalidated the internal choices and structures of parties on a handful of occasions. See, for example, *Smith v Allwright* (1944) 321 US 649 (a party cannot exclude participation on the grounds of race)

⁷ (1989) 489 US 214 at 223.

⁸ *ibid.*

⁹ *ibid* at 227–28.

¹⁰ (2000) 530 US 567.

support from the general electorate so as to prevent individuals representing extreme and narrow interests from emerging as the nominated candidate. The court dismissed the legislative concerns, and held that there could be no ‘heavier burden on a political party’s associational freedom’ than to compel a party to allow non-party members to participate in the nomination process and ultimately influence the message of the party.¹¹

A consequence of the liberal model is that private individuals and entities are entitled to use as much of their economic resources and personal efforts as they deem desirable to promote a political cause to those that are willing to listen to their message. To be clear, the liberal model does not believe that the powerful in society should enjoy more political leverage. The liberal model rests on the assumption that each citizen’s right to vote for elected officials is sufficient to ensure parity of political participation. It makes little difference, the argument goes, that certain powerful economic actors have more influence over political discussion as the electorate remains free to reject the views of the powerful when casting their vote.¹² To the extent that economic influence is considered an unfair factor in political debate, the assumption is that political parties will self-regulate to ensure broad support amongst the general electorate because appealing only to a few narrow and financial interests will result in failure at the polls.¹³

1.2 *Supervisory model*

The supervisory model is critical of the assumption that underpins the liberal model: by itself, the right to vote is incapable of ensuring equal participation in political debate (or perhaps that the right to vote should not be viewed as the end of the democratic process but only as one way to participate in public discourse). The predominant concern of the supervisory model is that an unregulated political market is not conducive to the establishment of an accountable and representative state. The unbridled ‘market of ideas’ may appear neutral at first glance, but it may cause the entrenchment of existing political forces in a way that dissuades meaningful political discussion and participation amongst

¹¹ *ibid* at 577, 581–82. US scholars criticise *Jones* on the basis that affording political parties a right to associate free from state interference severely restricts the ability of the state to ensure that political parties function properly and efficiently. See Samuel Issacharoff, ‘Private Parties with Public Purposes’ (2001) 101 *CLR* 274, 294–97.

¹² See generally *Citizens United v Federal Election Commission* (2010) 588 US 310.

¹³ See *Eu* (n 7) at 227.

the entire citizenry.¹⁴ This risks a system of political inequality. There is thus an understanding that pre-existing economic and political status wields significant influence over political debate, and, if left uncontrolled, it has the effect of unduly impairing the equal right of all citizens to fair political participation. To counter these imbalances, the supervisory model deems it prudent to impose certain controls over the internal activities of a political association.

The supervisory model is therefore characterised by a reduced level of protected autonomy interests, which, in turn, increases the scope of the state to regulate the internal activities of political parties. The supervisory model does not view political parties as any other voluntary association, which is the case under the liberal model. While private individuals may form and control the activities of political parties, the supervisory model focuses on the fact that political parties are created to achieve a distinctive public purpose: to influence and form the state.¹⁵ In doing so they do not remain self-contained and heterogenous associations operating solely for the private benefit of their members as is the case with other types of voluntary associations.¹⁶ Rather, in order to gain control of elected state institutions and govern public assets on behalf of an entire citizenry, the primary function of any mainstream political party is to propose governmental policies that aim to reconcile and balance all of the conflicting social interests of the many diverse constituencies that comprise a society. Political parties therefore act as the intermediary between society and the formal structures of the state.

The German constitutional system reflects features of this model. The country's painful past, which witnessed the coming to power of an authoritarian political party through democratic processes, led the post-World War II constitutional drafters to regulate the internal workings of political parties to ensure they operate in a manner that advances the democratic system envisaged in the constitutional framework. The most prominent example is article 21(1) of the Basic Law. The provision mandates that all parties must ensure that their internal organisations conform to democratic principles. In contrast to the approach of the US Supreme Court which holds that constitutional rights insulate political parties from external interference, the German Federal Constitutional Court interprets article 21(1) to require political parties to structure themselves 'from the

¹⁴ Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free Press 1993) 191.

¹⁵ Kelsen (n 4).

¹⁶ Nancy Rosenblum, 'Political Parties as Membership Groups' (2000) 100 *CLR* 813, 825.

bottom up, that is, that the members must not be excluded from decision-making processes, and that the basic equality of members as well as freedom to join or leave must be guaranteed'.¹⁷ The express incorporation of political parties into the text of the Basic Law means that that parties are not only politico-sociological entities. As the German Federal Constitutional Court has held, political parties form an integral part of Germany's 'constitutional structure' and the 'constitutional ordered political life'.¹⁸ They therefore hold the rank of a 'constitutional institution' (but are not strictly speaking organs of the state).¹⁹ These institutions are therefore subject to the supervisory control of the Basic Law.

No democracy subscribes exclusively to either of these approaches; there is a continuum between the two approaches, and jurisdictions may adopt different models for different aspects of internal regulation (e.g. internal party democracy and campaign funding). These two models serve to illustrate the potential risks associated with constitutional choice between self-regulation and state-regulation. The liberal conception does not trust the state, and the state should therefore be precluded from taking any initiatives to regulate political parties even if they purport to improve the quality of democracy and the effective participation of citizens in the democratic process. The supervisory model does not fully trust a citizenry to self-regulate itself. The concern is that certain private interests may come to establish a stronghold over the political process, and, in turn, state decision-making. External regulation is therefore warranted.

This chapter focuses on the right of ordinary rank-and-file members to participate in the internal activities of their political party, and it does so by tracing how the South African Constitution has caused a shift from the liberal to the supervisory model.

¹⁷ *The Socialist Reich Party Case*, quote taken from Richard H. Pildes, 'Political Parties and Constitutionalism' in Tom Ginsburg and Rosalind Dixon (eds) *Comparative Constitutional Law* (Edward Elgar 2011) 254, 261. See also *The Communist Party Case* (n 3).

¹⁸ *The Schleswig-Holstein Vosters' Association Case* (1952) 1 BVerfGE 208, quote taken from Donald Kommers and Russell Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) 271.

¹⁹ *The Socialist Reich Party Case* (n 3) quote taken from Kommers and Miller (n 18).

2 The participation deficit in the common law

South Africa historically adopted the liberal model, which stems from the English-speaking common law tradition of treating political parties as private voluntary associations.²⁰ In accordance with the common law, political parties are viewed as no more than a contractual agreement amongst private individuals who undertake to organise themselves in the manner they consider most appropriate to acquire political power in order to implement their favoured policies.²¹ As the Supreme Court of Appeal recently noted—

A political party is a voluntary association founded on the basis of mutual agreement. Like any other voluntary association, the relationship between a political party and its members is a contractual one, the terms of the contract being contained in the constitution of the party.²²

At the time of forming a political party, the founders are required to create the structures and procedures of the association. This is a choice left entirely to the membership of the party, which presumably is a decision taken on how best to organise a campaign-driven association. These structures bind all members. Once the organisation is established, a prospective member would have no opportunity to negotiate their terms of participation. In the event that members are unsatisfied with the prescribed rules of participation, their only option is to persuade the relevant structures to amend the rules in accordance with the procedure set out in party's constitution.

Two important legal consequences flow from the liberal model of the common law, both of which curtail the effective participation of ordinary rank-and-file members.

²⁰ See Pippa Norris, *Building Political Parties* (International IDEA 2004) 20. On the classification of political parties as private associations in the English-speaking common law world, see Graeme Orr, 'Private Association and Public Brands' (2014) 3 *Critical Review of International Social and Political Philosophy* 332, 334–37.

²¹ See *Mcoyi v Inkatha Freedom Party* 2011 (4) SA 298 (KZP) para 30 ('a political party is a voluntary association [...] founded on the basis of mutual agreement, which entails an intention to associate, and consensus on the essential characteristics and objectives of the association'); *Wood v Ondangwa Tribal Authority* 1975 (2) SA 294 (A) at 312G–H (a political party is an agreement of persons); *Khan v Louw* 1951 (2) SA 194 (C) at 211B–E (members in a political party are 'bound by contract to one another'). See also *Bushbuck Ridge Border Committee v Government of the Northern Province* 1999 (2) BCLR 193 (T) at 200. Compare minority decision of Cameron J in *My Vote Counts v Speaker of the National Assembly* 2016 (1) SA 132 (CC) paras 113–16 (political parties do not sit comfortably in either the definition of an organ of state or a private entity).

²² *Matholwa v Mahuma* [2009] 3 All SA 238 (SCA) para 8.

First, members of a political party are not obliged to contract with individuals with whom they choose not to associate. It is a cardinal principle of contract law that an enforceable agreement is premised on the consent of the contracting parties. The law should not coerce individuals and entities to enter into an agreement, and no legal consequences ought to flow from a decision not to contract. Moreover, once a binding agreement to associate is concluded, contracting individuals remain free to dissociate from one another. Of course, if this does occur, any prejudiced individual is entitled to claim legal relief as permitted by either the specific terms of the contract or the general rules of law that find application in instances of breach of contract. The application of these principles to a contract of political association however operates to the disadvantage of individual members.

Snyman v Vrededorp Electoral Division Committee of the National Party of the Transvaal illustrates this point.²³ In this matter, a political party expelled a member because he had allegedly campaigned against the official candidate of the party in an upcoming election. The ousted member approached the court claiming that his expulsion was irregular on the ground that he was not afforded a sufficient opportunity to contest the charges. He therefore requested the court to nullify the expulsion and order that he be reinstated. The high court accepted that the amount of time afforded to prepare a defence was unduly short, and consequently that his expulsion was unlawful. The court however declined to grant the relief sought on the basis that a court of law has no inherent jurisdiction under the common law to issue an order that a political party is obliged to associate with a particular individual.²⁴ The court reasoned that the relationship between members in a political association is not based on any patrimonial or other clear legal interest, which would otherwise permit a court to interfere with the internal decisions of an association.²⁵ Political associations are built on purely personal relationships to campaign for particular social objectives, which, according to the reasoning of the court, is an interest a court should not provide legal protection.

It may be true that in the case of a voluntary association there is a contract to associate between the aggrieved member and the other members. But such an agreement is strictly personal in its nature, and a Court of law will not enforce it by an order for

²³ [1929] WLD 138.

²⁴ *ibid* at 143.

²⁵ *ibid*.

specific performance or by injunction. It will not enforce the continuance of purely personal relations.²⁶

In the event that a claim for specific performance is impossible or otherwise considered as undesirable, contract law permits the prejudiced contracting party to claim contractual damages.²⁷ But these claims are limited to the amount that is required to place the innocent contracting party in the same financial position had the contractual obligations been performed.²⁸ In order to succeed with such a claim, the innocent contracting party is required to prove actual financial loss, and that the loss was both factually and legally caused by the breach.²⁹ Factual causation is proved by the traditional *condition sine qua non* ‘but-for’ test, and legal causation for breach of contract is only present when it is proved that the damages flow ‘naturally and generally’ from the breach. That is, contracting parties must have contemplated that a financial loss would probably have ensued in the event of the breach and that the damages are not too far removed from the breaching act so as to render the claim unreasonable in light of legal policy concerns. The claim for damages is further narrowed by the general principle that an award of damages must not place any undue hardship on the defaulting party.³⁰ As a result of all of this, the courts will not punish bad intentions in the form of punitive or nominal contractual damages.³¹ The courts have furthermore declined to order damages to sooth any inconvenience or emotional stress.³²

²⁶ *ibid* at 143–44.

²⁷ Specific performance is the primary remedy for breach of contract in South Africa. Courts however enjoy discretion not to order performance, and will generally decline to do so in instances where performance is impossible, will cause undue hardship, or would require the continuation of a highly personal relationship like employment contracts. See RH Christie, *The Law of Contract in South Africa* (4ed, LexisNexis Butterworths 2001) 613–15.

²⁸ See *Holmdene Brickworks v Roberts Construction Company* 1977 (3) SA 670 (A) at 687; *Victoria Falls and Transvaal Power Company v Consolidated Langlaagte Mines* 1915 AD 1 at 22.

²⁹ *International Shipping Company v Bentley* 1990 (1) SA 680 (A) at 700E–701C; *Holmdene* (n 30) at 687D–F.

³⁰ *Holmdene* (n 30) at 687B–C.

³¹ A few pre-1920 judgments awarded ‘nominal’ damages. See *Cilliers v Papenfus and Rooth* 1904 TS 73; *Solomon v The Alfred Lodge* 1917 CPD 177. The legal basis for awarding nominal damages has been criticised, and the courts refrain from doing so now. See DJ Joubert, *General Principles of the Law of Contract* (Juta 1987) 247.

³² See *Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 596C–597H (contractual damages cannot be awarded for intangible loss at the common law, but the legislature remains free to alter this rule); *Jockie v Meyer* 1945 AD 354, at 363, 367–68 (injured feelings are not recoverable as a remedy for breach of damages, but must be claimed in delict in accordance with the *actio injurarum*; damages for inconvenience may however be awarded if the inconvenience ‘might reasonably be supposed to have been in the contemplation of the contracting parties as likely to result from the defendant’s breach of contract’.). These non-patrimonial losses may perhaps be

The narrow basis on which the South African contract law awards contractual damages means that an unlawfully ousted party member cannot claim relief on this ground. In accordance with these principles, the *Snyman* court confirmed that the jurisdiction of a court to award contractual damages to an unlawfully expelled member from an association is premised on the basis that the expulsion led to the deprivation of a proprietary interest or other legally recognised (and quantifiable) interest.³³ The court held that a party member who has simply lost out on the ability to participate in the activities of the association is therefore not entitled to contractual damages.³⁴ Most other types of clubs and associations vest their members with proprietary benefits. A sports club, for instance, grants a member the right to use the premises and other tangible resources of the club. It would therefore be possible for a court to remedy the loss of these benefits by an award of damages where a voluntary association unlawfully expelled a member. In the case of a political party, however, the court held that membership to a political party does not vest any comparable proprietary benefit.³⁵ Membership fees and the assets of the party are to be used by the governing body of the party in accordance with their discretion. Individual members have no claim to these funds, and they may not rely on this financial interest to invoke the jurisdiction of the courts.³⁶

The *Snyman* judgment established the precedent that an unlawful expulsion from a political association does not give rise to a legal cause of action. The common law effectively affords political parties — and, more specifically, the leadership of the party — the unrestricted power to dissociate itself from any member, for whatever reason, and without any legal repercussions.³⁷

The second legal consequence of the liberal model is that members of a political party enjoy only those (contractual) rights that are sourced in either the constitution of the

actionable in delict. See SWJ Van der Merwe and others, *Contract: General Principles* (4th edn, Juta 2012) 360. Early judgments of the Appellate Division held that damages would only be awarded if the aggrieved member can show that the domestic tribunal was ‘actuated by some indirect or improper motive’. An association is not liable when a functionary of the association acts in good faith and believes it is executing the rules of the association. See *Matthews v Young* 1922 AD 492, at 508, 510.

³³ *Snyman* (n 23) at 144–45.

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ See *De Waal v Van Der Horst* 1918 TPD 277 at 283 (a member must prove the infringement of a patrimonial interest as a requirement for challenging the decisions of a voluntary association before a court).

party or any other regulation that is adopted in accordance with the procedures prescribed in the constitution. Accordingly, in instances where an individual member has no contractual right to an alternative procedure or outcome, courts would require members to submit to the will of the party's governing body.

Wilken v Brebner highlights this point.³⁸ Here, the Appellate Division was called upon to assess whether members have any recourse against the majoritarian will of their party in a situation where decisions are taken that fundamentally curtail the interests of minority members. The dispute in this matter stemmed from the governing body of a political party adopting a series of resolutions that amalgamated the party with a rival party. An aggrieved member instituted legal action and argued that the resolutions were ultra vires on the ground that they deprive the minority members opposed to the merger of their existing membership rights. They argued that the resolutions had effectively dissolved the party, and, in accordance with contract law, a decision that terminates a contract can only be taken by the unanimous will of the entire membership. The lost membership rights, the member seemed to suggest, were sourced in the assets owned by the political party which must be utilised to further the main objectives of the party.

The argument was dismissed. The Chief Justice cautioned that courts should be reluctant to interfere with the resolutions passed in accordance with the procedures laid down in the rules of the party.³⁹ Political parties are large and cumbersome organisations. The ability of a political party to function as a viable association necessitates that they are composed of smaller and hierarchical structures.⁴⁰ The rules of the party will delegate powers and responsibilities to various structures within the party, and will furthermore create a governing body to control and monitor these structures.⁴¹ It is an implied term of the agreement that a member who joins a party has entrusted the management of the organisation to the various committees and leadership bodies created in terms of the constitution.⁴² The legal presumption is therefore that each individual member is 'subservient to the various bodies appointed to carry out the object of the party'.⁴³ A court will only interfere in a decision of the party when 'it is clear that an individual

³⁸ 1935 AD 175.

³⁹ *ibid* at 180–81.

⁴⁰ *ibid* at 181.

⁴¹ *ibid*.

⁴² *ibid* at 181–83.

⁴³ *ibid* 181.

member of the association is entitled to demand that his voice shall be heard' in accordance with the association's constitution.⁴⁴ If this were not so, the court postulated, the effective operation of a political party would be undermined. The recognition of individual member rights not sourced in the constitution may lead not only to minority members holding hostage the majority of the party but may also induce disloyalty among members who otherwise ought to commit themselves to the party leadership.⁴⁵

The court examined the constitution of the party and found that the executive governing body enjoyed the exclusive power to amend the constitution, which included the power to decide to merge the party with another. In contrast, the constitution did not in express terms afford individual members a right to either participate or object to such a decision. The member 'surrendered his own will and his own voice to the supreme council of the party [...] and it makes no difference whether there are any party funds or not'.⁴⁶ As a result, the presumption of subservience was not discharged and the application was accordingly dismissed.

The above two cases illustrate the participation deficit found in the common law. As political parties were viewed solely through the prism of the common law of contract, the law afforded these organisations the full liberty and responsibility to self-regulate. A court would therefore decline to protect a member whose participation in the organisation is threatened unless the terms of the contract provided otherwise. Though, as the *Snyman* decision shows, a breached contractual right to participate would also not be vindicated. The common law therefore permits political parties — a term which should be as read synonymous with the party leadership — to structure their internal decision-making processes as autocratically or as democratically as the organisation considered desirable.

Within the South African political environment, there are many instances of parties adopting autocratic practices. There are many complex reasons why a political party operating within a constitutional democracy would opt to silence party members, but it is difficult not to conclude that the liberal model of the common law contributed to this development in South Africa. The failure to provide legal protection to the basic participation interests of ordinary party members outside the terms of the contract gave rise to a climate that permitted the political leadership of a party scope to employ

⁴⁴ *ibid* at 182.

⁴⁵ *ibid* at 185–86.

⁴⁶ *ibid* at 186.

autocratic practices whenever it was expedient to do so. The common law, at least in effect, allows the political leadership of the organisation to assume for itself an almost unfettered power to control the extent to which ordinary members participate in policy and leadership debates.

It would be a mistake to view the application of the liberal model as a laissez-faire development of the ostensibly apolitical rules of contract. Contract law allows for the alteration of general principles in order to protect vulnerable interests and balance unequal bargaining positions. In fact, during the apartheid years, the common law courts imported public law review criteria into other sorts of voluntary associations to ensure more parity between powerful association leaders and ordinary rank-and-file members.⁴⁷ In the context of political parties, however, the courts declined similar requests. The legal reasons that justify this approach were a combination of strict compliance with the contractual terms, the need to protect the association interests of the organisation against external interference, and the fact that political participation was simply not an interest protected in terms of the internal logic of the private common law. There is another reason that supported the continued application of the liberal model, one that is not mentioned in the case law. These judgments must be read in the wider political context of the time. Executive and legislative policy during the apartheid years viewed any political voice advocating against the programmes of the state as needless and at times even criminal. As courts were bound to the laws of the authoritarian state, there was little to no discretion to view the protection of dissenting political voices within parties as a matter of legal policy.⁴⁸

The application of the liberal model continued into the constitutional era. The law reports record several instances of high court decisions only intervening in internal party activities when an aggrieved member could show an infringement of a clear patrimonial interest (i.e. remuneration). And then the courts would only provide limited

⁴⁷ See *Turner v Jockey Club* 1974 (3) SA 633 (A); *Marlin v Durban Turf Club* 1942 AD 112. These decisions held that the obligation of a voluntary association to abide by the fundamental principles of justice in the procedures employed by a domestic tribunal must be derived from either an expressly stated provision or an implied term that flows as a necessary implication of the contract. The obligation is therefore sourced in the contract itself. In other words, what constitutes the fundamental principles of justice is not strictly grounded in considerations of unequal power relations or any other public law principle applicable to the public administration; though, it cannot be denied that administrative law has heavily influenced the contents of these implied contractual provisions. See Lawrence Baxter, *Administrative Law* (Juta 1984) 340–41.

⁴⁸ *Oriani-Ambrosini v Sisulu* 2012 (6) SA 588 (CC) para 49 (the apartheid regime suppressed dissenting views as it sought to impose hegemonic control over thought and conduct).

protection: not a substantive interest to participate in the activities of the party but rather a procedural right to a fair process before a benefit is withdrawn.⁴⁹ These decisions upheld the principle of non-external interference, believing that individual members are best suited to regulate their own activities. This observation is somewhat ironic, as the greatest threat to political participation in the constitutional era has been almost exclusively internal. There are countless news reports that show how fellow party members that undermine the equal participation of their compatriots. The Constitutional Court sought to rectify this problem in the decision of *Ramakatsa v Magashule*, which is a decision that caused a doctrinal shift towards the supervisory model.⁵⁰

3 The constitutional right to internal party participation

Ramakatsa originates from a power struggle within the ANC. Six members of the governing party called upon the Constitutional Court to set aside all of the outcomes and resolutions of the Free State provincial conference. More specifically, the applicants sought an order declaring invalid the election results of the provincial leadership of the conference. Provincial leadership serves a key role within the ANC. They manage branch structures falling within their respective province, and enjoy the power to send delegates to the national elective conference.

The aggrieved party members complained that a series of irregularities transpired which effectively excluded them from participating in the nominating and voting procedures for the election of provincial leaders. The irregularities included allegations that eligible members were excluded from participating in certain branch meetings, that one branch was excluded wholesale from sending delegates to the provincial conference, and that two branches that failed to hold elective meetings (and were therefore disqualified in terms of the rules of the party from participating in the provincial conference) sent delegates to the provincial conference. Though not explained in the judgment of the court, the aggrieved members argued elsewhere that these irregularities

⁴⁹ See *Van Zyl v New National Party* [2003] 3 All SA 737 (C); *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (TkH); *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C).

⁵⁰ 2013 (2) BCLR 202 (CC).

were instigated as part of a strategy to subvert a dissenting faction within the political party that intended to oppose the current national leadership of the ANC.⁵¹

Before the high court, which dismissed the case on procedural technicalities, the aggrieved members claimed that the failure of the party leadership not to investigate these objections infringed upon their right to fair administrative action.⁵² On appeal, the Constitutional Court held that it was unnecessary to entertain the matter on the ground of administrative action. The court failed to offer an explanation for their avoidance of the question, but one can make an educated guess. Administrative law provides no inherent or stand-alone right. All of the previous case law on this question holds that a member of a political party must demonstrate that the political party threatened an existing right or patrimonial interest as a precondition to the courts reviewing the actions of the party under administrative law.⁵³ In the *Ramakatsa* matter, in contrast, none of the litigants held elected positions in government nor did they receive any patrimonial benefit from the party. In other words, the applicants had no more than a non-patrimonial contractual right to participate in the party (which, as shown above, the liberal model under the common law affords no actual protection).

The applicants raised a new ground on appeal, which the court reconstructed as a request to develop the common law of contract in a way that recognises and safeguards the right of ordinary rank-and-file members to participate in the political party of their choice. The argument was grounded in section 19(1)(b) of the Constitution, which guarantees the right of every citizen to participate in the activities of a political party. History suggested that their plea would fail. The initial motive for entrenching section 19 into the Constitution was to prevent a repeat of apartheid, which witnessed the apparatus of government securing their power through the banning of political parties and the criminalisation of certain types of political speech.⁵⁴ From this viewpoint, section 19 encapsulates the liberal model of party regulation as it aims to prevent external bodies from implementing measures that impair the right of citizens to join and participate in the

⁵¹ Ernest Mabuza, 'Constitutional Court Explains Ruling on Free State ANC Election' (*Business Day* 18 December 2012).

⁵² *Ramakatsa v Magashule* [2012] ZAFSHC 207, unreported judgment, 26 October 2012.

⁵³ See cases discussed in notes 47 and 49.

⁵⁴ See Internal Security Act 74 of 1982; Unlawful Organisations Act 34 of 1960; Suppression of Communism Act 44 of 1950.

political party of their choice.⁵⁵ This explains why the high courts were initially unwilling to apply section 19 of the Constitution to the internal activities of political parties. In *Mcoyi v Inkatha Freedom Party*, for example, the high court was called upon to determine whether ordinary members could compel their political party to convene an elective conference if the party leadership failed to do so.⁵⁶ The court fell back on the common law liberal approach — including the decision of *Snyman* — and found that members only have those rights as stipulated in the contract of the association.⁵⁷ Ordinarily, members have no patrimonial or other clear right to demand that the governing body of a political party acts in a particular manner. The court held that the constitution in the case at hand made no mention of a clear or implied right to an elective conference. Members in this political party were subject to the decisions of party leaders on whether, if at all, to hold an elective conference. The high court dismissed the application, and concluded that the inability of members to choose party leaders on a regular basis did not violate section 19 of the Constitution.

In *Ramakatsa*, however, the Constitutional Court effectively overruled *Mcoyi* through expanding the scope of the constitutional right.⁵⁸ The court held that the right does not only burden the state with a negative obligation not to interfere in the activities of political parties. It also imposes an obligation on all political parties to facilitate the participation of their members within the organisation. Section 19(1)(b) confers the right of political participation in ‘unqualified terms’, and it—

guarantees freedom to make political choices and once a choice on a political party is made, the section safeguards a member’s participation in the activities of the party concerned. [Members of a political party] enjoy a constitutional guarantee that entitles them to participate in [the party’s] activities. It protects the exercise of the

⁵⁵ *Ramakatsa* (n 50) para 64.

⁵⁶ *Mcoyi* (n 21).

⁵⁷ See also *Ngiba v African People Convention* [2013] ZAKZDHC 21, unreported judgment, 5 April 2013, para 33 (a court should not ordinarily intervene unless the expelled member stands to lose a proprietary interest).

⁵⁸ The argument for an expanded interpretation of section 19(1)(b) is supported by section 39(1) of the Constitution, which requires the court to interpret constitutional rights in a manner that promotes the ‘values that underlie our open and democratic society based on human dignity, equality, and freedom’. This requires that rights be ‘generously and purposely’ interpreted. Any necessary limitation of the right will rather be performed at the rights-limitation stage of the enquiry. See *Ramakatsa* (n 50) para 70.

right not only against external interference but also against interference arising from within the party.⁵⁹

The *Ramakatsa* judgment confirmed the common law position that political parties are voluntary associations. The legal relationship between members and the party is contractual, albeit a ‘unique’ sort of contract, and the constitution of the party as well as other rules adopted in accordance with the party’s constitution all form part of this legal agreement.⁶⁰ As the contractual constitutions of political parties are the main legal instruments that facilitate the participation of members in the activities of a political party, the court reasoned that section 19 prohibits political parties from adopting constitutions that deny the right of internal political participation.⁶¹ In the event that the rules of the association fail to meet this requirement, the contractual provisions of a political party are ‘susceptible to a challenge of constitutional invalidity’.⁶² It bears noting here that the aggrieved members in *Ramakatsa* did not challenge the party rules for its failure to meet the participation requirements of section 19. The rules did permit participation in the elective conference. The complaint was rather that the party leaders failed to abide by their own contractual rules. The Constitutional Court agreed. But, in reformulating the legal question for resolution, the court added constitutional force to the contractual remedy of specific performance. The court held that a failure to comply with the contractual provisions of the association would not only constitute a breach of contract, but would also constitute conduct inconsistent with section 19 of the Constitution.⁶³ In sum, political parties are constitutionally obliged to act in accordance with their own constitutions, which, at a minimum, must include procedures that facilitate the participation of members.

Finding that eligible members were excluded from participating in the elective conference, the court concluded that the political party’s conduct was inconsistent with their own rules and section 19(1)(b) of the Constitution. As the ANC offered no justification for the violation, the court declared the impugned elective conference unlawful and invalid.

⁵⁹ *Ramakatsa* (n 50) para 71.

⁶⁰ *ibid* paras 79–80.

⁶¹ *ibid* paras 73–74.

⁶² *ibid* para 74.

⁶³ *ibid*.

4 Developing the common law

The development of the common law in accordance with section 19(1)(b) of the Constitution is notable for three reasons.

First, *Ramakatsa* departs from the earlier judgment of *Barkhuizen v Napier*.⁶⁴ In that decision, which remains the seminal judgment on the application of the Constitution to contract law, the Constitutional Court held that contractual provisions cannot be tested directly against a constitutional right. Rather, constitutional values inform the dictates of public policy, which, in turn, may necessitate the modification or negation of a contractual term. Chapter four shows how *Barkhuizen* requires courts to balance contractual autonomy with other constitutional values in the context of each case. This approach was not followed in *Ramakatsa*. The court rather concluded that the ‘constitutions and rules of political parties must be consistent with the Constitution [of South Africa] which is our supreme law’, failing which they are liable to be declared unlawful.⁶⁵ Freedom to contract was not viewed as a protected interest that could possibly negate the constitutional protection of section 19 in a balancing exercise. The court effectively outlawed the contractual power of party members to create a voluntary association that permits autocratic procedures. Although section 19(1)(b) only provides a procedural right to participate in the activities of a political party (which includes the right to participate in leadership election, and, given the legal reasoning offered in *Ramakatsa*, probably also includes the right to participate in policy debates), the effect of the right is that members cannot be removed from the organisation for merely expressing dissenting views. Section 19(1)(b) thus guards against autocracy, and contractual autonomy can thus no longer be employed to silence and purge party members. The common law’s position that political parties are free to disassociate themselves from a member without legal repercussions has thus been altered.

The unwillingness of the *Ramakatsa* court to protect the autonomy interest of political parties in the situation described above suggests that the Constitutional Court has effectively redefined the right to political association. Section 18 of the Constitution guarantees everyone the right to free association, and, when applied to political parties,

⁶⁴ 2007 (5) SA 323 (CC).

⁶⁵ *Ramakatsa* (n 50) para 72.

typically means that internal party decisions are safeguarded against external interference. This interpretation corresponds to the liberal model of regulation, but the shift towards the supervisory model in *Ramakatsa* means that the right to political association must now be viewed as a conduit right. The right serves to protect and realise other constitutional rights and objectives of the electoral system, which includes the right of rank-and-file members to participate in the internal activities of a political party. The internal activities of political parties that undermine these other objectives are afforded no or minimal constitutional protection.⁶⁶

Second, the conduit nature of the right to political association as reflected in the *Ramakatsa* judgment fits the power-curve theorised in chapter five. In brief, the two conditions are met for the recognition of a constitutional obligation. First, the conduit nature of political parties diminishes the otherwise autonomous freedom of a voluntary association. Second, political parties control exclusive access to a constitutionally protected interest. That is, political parties are the only vehicles through which citizens can stand for elected government positions (only political parties contest national and provincial elections and independent candidates are prohibited).⁶⁷ As a result, political parties are placed near the top of the power-freedom curve. This position, according to the theory, suggests that political parties should indeed be imposed with a constitutional obligation, and, given that parties are plotted on the left of the power curve, it indicates that they are unlikely to escape their constitutional obligations in a balancing exercise unless a compelling justification is offered. The *Ramakatsa* court could not think of one.

Third, the recognition that members of a political party enjoy a constitutional right to participate — and the corresponding duty on political parties to facilitate this right — has come entirely at the behest of the judiciary.⁶⁸ It is a position that the elected

⁶⁶ The conduit nature of the right reflects the approach in *Khumalo*. See chap 5, sec 3.3.

⁶⁷ Constitution ss 46(1)(d), 105(1)(d). The Constitution establishes a parliamentary system of government; the membership of national and provincial legislatures is determined by ‘an electoral system that results, in general, in proportional representation’. The Electoral Act 73 of 1998, s 27, schedule 1A translates this constitutional provision into a closed list proportional representation system of elections. In other words, political parties are represented in the national and provincial legislatures based on the proportion of votes received. In terms of the legislative framework, each political party is required to submit a fixed list of ranked candidates prior to an election. The law does not prescribe the manner in which the party formulates their lists, and, consequently, each political party decides for itself how to propose and rank candidates. In *Majola v State President of the Republic* [2012] ZAGPJHC 236, unreported judgment, 30 October 2012, the high court held the prohibition on independent candidates does not violate the Constitution.

⁶⁸ There are two exceptions to this observation. The first is the few instances where some judgments have held that political parties fall within the purview of PAJA, though others judgments have

branches of government have not endorsed. There is no recorded attempt on the part of the legislature to regulate the internal participation rights of party members. The legislature has tacitly approved the liberal model of the common law, and it is fair to deduce that it is legislative policy that political parties are private autonomy associations that are free from external regulation. The silence of the legislature is amplified when consideration is given to the extensive legislative regulation of other private entities in order to protect dissenting views. Compare the legislature's position on political parties to that of trade unions. Section 23(2) of the Constitution guarantees the right of every worker to join and participate in the activities of a trade union. The Labour Relations Act expands on this constitutional right, and specifically safeguards the right of trade union members to elect the leadership of their chosen trade union.⁶⁹ Although political party members are afforded the same constitutional right, no similar legislative scheme affords this level of legal protection to political party members. Further examples can be found in company law. Legislative schemes provide protection to minority shareholders against the prejudicial or oppressive action of other shareholders or company directors.⁷⁰ And employees who disclose irregular and unlawful conduct are also afforded statutory protection.⁷¹

On a critical but fair view, the South African political landscape suggests why the legislature prefers the liberal model of the common law. The senior members of the national legislature — read: the leadership of political parties represented in Parliament — stand the most to lose by a shift towards the supervisory model.⁷² The prescription of external legislative requirement on the internal operations of political parties risks undermining the political power they currently enjoy in accordance with the common law, and they have no real incentive to undermine their current status. There can be little dispute that autocratic practices within political parties entrench the dominance of party leaders, which, in turn, permits party leaders to solidify their role as the representatives of the party in government.

disagreed with this interpretation. The other is the application of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which is the national legislation implemented to give effect to section 9(4) stating that no person may discriminate on the grounds protected in the constitution. The Equality Act prohibits state and non-state actors alike from taking action that unfairly discriminates on a protected ground.

⁶⁹ Constitution s 23(2); Labour Relations Act 66 of 1995, s 6(2)

⁷⁰ Companies Act 71 of 2008, s 163.

⁷¹ Protected Disclosures Act 26 of 2000.

⁷² Kate O'Regan, 'Political Parties: The Missing Link in Our Constitution?' *Conference on Political Parties in South Africa*, 27 August 2015, at 5.

All this is why the development in *Ramaktasa* is remarkable, as it was not necessary to invoke the protection of the Constitution to secure the interests of the individual members.⁷³ The contractual rules of the ANC provide each member an express contractual right to participate in the elective process, and the members were therefore entitled to claim specific performance. There was no pressing need to invoke section 19 of the Constitution in order to secure the participation rights of the members. One can only infer that the Constitutional Court believed that this development to the common law was necessary given the political landscape of the country. Political parties are central and indispensable actors to a healthy and functioning democracy, and the mushrooming of autocratic practices within the internal activities of political parties pose a threat to the realisation of this constitutional objective.

⁷³ *Mafongosi* (n 49) paras 11, 24; *Marais* (n 49) paras 34.

THE BENEFITS OF RIGHTS LEGISLATION

This chapter identifies three benefits of legislative remedies over judicially created ones, which provide an explanation for the court's pivot towards legislation.

1 Limits of the judicial law-making toolkit

The previous two chapters showcase conflicting judicial attitudes. Chapter six describes a Constitutional Court reluctant to develop the common law, opting rather for legislative advice and remedies. Chapter seven, in contrast, paints a court unwilling to even consider legislative preferences. What explains the difference? More specifically, given that the development of the common law is ordinarily the default approach, what explains the pivot towards legislative remedies?

The case law offers few express clues, apart from one that simmers throughout the jurisprudence on the horizontal application of constitutional rights. Judges from both the Constitutional Court and Supreme Court of Appeal have repeatedly opined (though not always) that the judicial power to develop the common law is somewhat constrained. And this simmering belief crystallises into one of two forms. The first stems from the fact that the legislature serves as the primary institution responsible for law-reform, which, according to some arguments, requires the courts to display a degree of restraint in the exercise of their own law-making mandate.¹ But this explanation is strained. This

¹ For a scholarly defence of this view, see Chris Sprigman and Michael Osborne, 'Du Plessis is Not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes' (1999) 15 SAJHR 25, 50–51 (economic and social progress is best realised through

thesis has already argued that constitutionally guaranteed relief cannot be withheld merely because Parliament does not have the political will to enact appropriate laws.² Section 8(3)(b) of the Constitution supports this conclusion. The provision sets out an unconditional instruction to the courts to rebuild private law through the development of the common law whenever legislation fails to give proper effect to the constitutional obligations of private individuals and entities. It is perhaps for this reason that the courts have applied this belief of comity inconsistently. In some cases the Constitutional Court has invoked the primacy of legislation to justify judicial inaction, whereas other cases have held that such an argument is weak because the development of the common law does not preclude future legislative interventions.³ Given that this belief of comity fails to offer a constitutionally sound justification for pivoting towards legislative remedies, it can be swept away for purposes of this chapter.

The second manifestation of the constraint is that the law-making toolkit of the judiciary — which is primarily the development of the common law — has limits. That is, even though the courts recognise the need to grant relief, the common law proves to be an ill-equipped framework to meet all of the demands of the Constitution. The drafting history of the South African Constitution bears out this tension. As described in chapter two, the horizontal application of constitutional rights was initially introduced as a means to protect the capacity of the legislature to implement social and economic policies because the drafters feared that the judiciary would be unwilling or unable to give effect to these envisaged laws. The fear grew from many seeds, but one of them was that the philosophical underpinning and core doctrines of the common law would struggle to facilitate some of the economic and social goals of the Constitution including the control of private power.

The purpose of this chapter is twofold. First, the chapter elaborates on the claim that the capacity of the judiciary to exercise their law-making mandate under the horizontal application provisions is limited. It does so by splitting the constraint into three sub-limits (see Figure 6 below).⁴ Second, the chapter details how constitutional

legislative programmes; the direct horizontal application of rights should not be permitted as it undermines Parliament's law-making powers).

² Chap 1, sec 2.2; chap 4, sec 3. See *S v Bhulwana* 1996 (1) SA 388 (CC) para 32; *Paulsen v Slip Knot Investments* 2015 (3) SA 479 (CC) para 116.

³ See *Paulsen* (n 2).

⁴ The three limits overlap and are not exhaustive. This chapter splits the judicial law-making toolkit into three to facilitate the discussion of the benefits of rights legislation.

rights legislation (which are those legislative schemes that give effect to constitutional rights in the private sphere) are likely to contain features that mitigate the limits of the judicial law-making toolkit. Figure 6 sketches a roadmap for the discussion ahead.

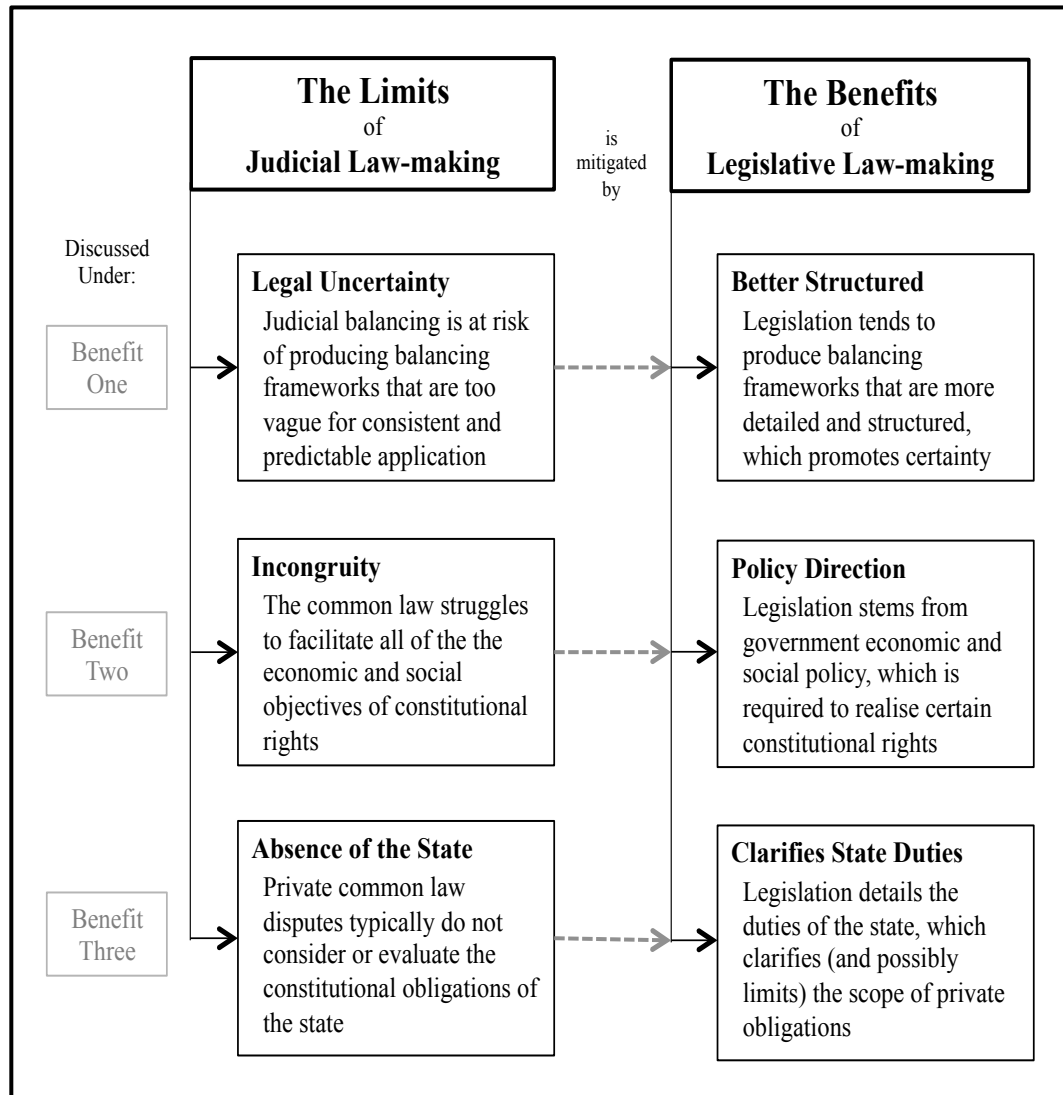


Figure 6: How the benefits of rights legislation mitigate the limits of judicial law-making

2 **Benefit one: legislative balancing is more structured**

The first limit of the judicial law-making toolkit can be summed-up as a problem of legal uncertainty, and it distils to the observation that courts can sometimes do no better than to prescribe somewhat vague and abstract rules to reconcile conflicting rights. Chapter four has already detailed the extent and causes of this limit.⁵ While imprecisely formulated tests and standards may be an inevitable and arguably welcomed outcome of the judicial balancing process, the risk remains that loosely defined tests introduce the possibility that judges will vacillate in their decision-making. This no doubt erodes legal certainty, which, in turn, undermines the rule of law, a central tenet of the South African constitutional order.⁶

Consider the negative obligation of the access to housing right discussed in chapter six, and contemplate the outcome if the Constitutional Court had in fact opted to apply the inflated-substantive reading of the negative obligation of the housing right to the common law. Writing in the seminal eviction judgment of *Port Elizabeth Municipality v Various Occupiers*, the court anticipated the inherent complexity of judicially weighing property and housing rights:

[T]he Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.⁷

The task of weighing these two substantive rights invariably invites a considerable amount of judicial discretion, because, in the words of the Constitutional

⁵ Chap 4, sec 6.

⁶ *Mighty Solutions v Engen* 2016 (1) SA 621 (CC) para 37; *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) para 39.

⁷ 2005 (1) SA 217 (CC) para 23.

Court, the overarching test cannot be any more specific than that the judiciary must ‘balance out and reconcile opposite claims in as just a manner as possible’ taking into account all of the relevant circumstances of the case.⁸ The Constitution provides limited guidance on how to develop and apply a framework for resolving these two clashing rights, and the common law certainly provides no indications on what factors and situations would justify protecting the housing right over a competing property right given that the common law has never had to consider a right to be housed.⁹ The only viable option for the courts in this situation is to prescribe open-ended tests, and allow for the incremental development of the law as each new dispute moulds the test into a more detailed and structured framework over time.

In the discussion that follows below, three constitutional rights legislative schemes are employed to demonstrate how constitutional rights legislation has the propensity to establish balancing frameworks that are more structured. That is, the balancing process is more detailed and precise, which is a characteristic that promotes legal certainty and consistent application. The discussion also shows why the judicial balancing processes cannot easily replicate this benefit of enhanced precision and detail. This legislative benefit is not always available or needed, however. This section concludes by demonstrating that the judicial law-making process may well yield balancing frameworks that are materially no less precise than that contained in legislation.

2.1 Revising the balancing models

To illustrate this first legislative benefit, it is necessary to begin by revising the models of balancing theorised in Part B. Chapter four identified two ways to balance conflicting constitutional rights, namely process-based balancing and outcome-based balancing. The former avoids balancing rights in the abstract, and prefers for courts to weigh the conflicting interests within the context of each particular case. The latter does the opposite. Outcome-based balancing results in fixed rules. A trump right is recognised for all scenarios, and little to no consideration is given to the specific circumstances of the case. The advantage and drawback of each model is clear: the trade-off is between legal

⁸ For an example of a court raising concerns over wide judicial discretion in constitutional matters, see *Johannesburg Housing Corporation v Unlawful Occupiers, Newton Urban Village* 2013 (1) SA 583 (GSJ) paras 29–52.

⁹ Dubiety introduces an additional concern: open-ended evaluative exercises threaten to swamp the courts. See *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) paras 34–36.

certainty and flexibility. Although courts are pulled towards outcome-based balancing because fixed rules better promote legal certainty and predictability, the courts have also recognised that exact precision is not always a desirable option.¹⁰ It is impossible to predict all future scenarios, and bestowing a degree of judicial discretion allows judges to protect deserving litigants in situations where fixed rules would result in harsh outcomes.

Chapter four illustrated the difference between process- and outcome-based balancing with reference to the defamation cases of *Khumalo v Holomisa*¹¹ and *New York Times v Sullivan*.¹² To recall, both matters investigated the extent to which constitutional rights should restrict the ability of a public official to claim damages for a defamatory statement. In *Sullivan*, the United States Supreme Court favoured outcome-based balancing. That court interpreted the First Amendment to the US Constitution to require freedom of speech to (nearly) always trump the reputation interests of public officials. In *Khumalo*, the South African Constitutional Court rejected this sort of balancing. The court held that the human dignity and privacy interests of politicians also deserve protection, and that it must be balanced against the right to free expression in the context of the case. In the event that a media defendant cannot prove that the defaming statement was both true and in the public interests, the court concluded, a defendant may also escape liability if he can prove that the publication was ‘reasonable’ in the circumstances of the case.

Chapter four presented the choice between process- and outcome-based balancing as binary. The choice is more accurately an array of options situated on a spectrum, ranging from highly flexible approaches that are sensitive to the facts and context of the case to approaches that indicate the interest to favour regardless of the facts.¹³ The position of any particular balancing exercise on the spectrum depends on the amount of discretion the enquiry affords the final arbiter of the dispute.

The existence of this spectrum is evidenced by the fact that *New York Times v Sullivan* is not purely an example of an outcome-based balancing process. The US

¹⁰ See *Mighty Solutions* (n 6) para 37; *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) paras 46–48.

¹¹ 2002 (5) SA 401 (CC).

¹² (1964) 376 US 254.

¹³ For examples of balancing exercises that position closer towards the outcome-based side of the spectrum, see *Sarrahwitz v Maritz* 2015 (4) SA 491 (CC); *Ramaktasa v Magashule* 2013 (2) BCLR 202 (CC).

Supreme Court qualified the bar on defamation suits by holding that liability would still flow if a false defamatory statement is published with ‘actual malice’.¹⁴ This enquiry is not purely a factual one into whether the media defendant had a reckless disregard for the facts.¹⁵ This narrow exception to the general rule incorporates value-laden considerations into the enquiry, as judges have to develop frameworks for determining who in fact constitutes a public official and what sort of information is of a legitimate interest to the public.¹⁶ Similarly, *Khumalo* is not purely a case of process-based balancing. A South African court entertaining a defamatory lawsuit does not undertake an amorphous exercise of pitting freedom of expression against the constitutional rights of dignity and privacy. For starters, the burden of establishing a reasonable publication falls upon the media defendant (*Sullivan* places the onus on the defamed claimant). The *Khumalo* court further strengthened the position of the defamed claimant when it outlined the parameters of the enquiry (and, in doing so, reduced judicial discretion and the scope of the enquiry). Quoting from a dictum of the Supreme Court of Appeal, the court held—

In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect for political discussion ... and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately, there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper. [...] [A] high degree of circumspection must be expected of editors and their editorial staff on account of the nature of their occupation; particularly, I would add, in light of the powerful position of the press and the credibility which it enjoys amongst large sections of the community.¹⁷

¹⁴ *Sullivan* (n 12) at 280.

¹⁵ See *Gertz v Robert Welch* (1974) 418 US 323 (the standard for liability for defamatory statements made against a private individual is lower than ‘actual malice’, and mere negligence is sufficient).

¹⁶ George Christie, ‘Injury to Reputation and the Constitution’ (1976) 75 *Michigan Law Review* 43, 63–64.

¹⁷ *Khumalo* (n 11) para 18, quoting *National Media v Bogoshi* 1998 (4) SA 1196 (SCA) at 1212G–1213A.

2.2 *The balancing framework in rights legislation*

The spectrum allows for the relative comparison of legislative and judicial approaches to balancing. Part B of the thesis demonstrated that the judicial balancing process plots more towards the process-based side of the spectrum. This section argues that rights legislation slides more towards the outcome-based end (though, to be clear, legislation is rarely positioned at the absolute-end of the spectrum).

The largest difficulty with proving this claim is that it is impossible to provide an exhaustive overview of every legislative scheme that aims to give effect to a constitutional right within the private sphere. In fact, it is even difficult to establish how many rights legislative schemes have been enacted since the commencement of the Constitution. Parliament often invokes constitutional rights to justify the enactment of new laws, and, even where Parliament does not expressly do so, it is fair to argue that many legislative remedies give effect to constitutional rights (in the same way that many pre-Constitution common law rules also give effect to constitutional rights). Therefore, to make the analysis manageable, only three rights legislative schemes are analysed. These are: the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (Eviction Act);¹⁸ the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act);¹⁹ and the Promotion of Access to Information Act (Information Act).²⁰ Their selection is due to the history outlined in chapter two. The debate on the horizontal application of rights initially stemmed from the need to ensure that the Constitution would not insulate private property rights against forthcoming economic and social policies, and the Eviction Act is amongst the most prolific legislative schemes for reconciling property rights and the right to have access to adequate housing. The Equality Act and the Information Act are the enabling legislative schemes of the equality clause and the right to access information. These two constitutional provisions are the only rights that expressly impose obligations upon private individuals and entities, but, in both instances, legislation is mandated to give effect to the right.

¹⁸ 19 of 1998. For other rights legislative schemes that balance the conflict between housing and land, see the Extension of Security of Tenure Act 62 of 1997 (ESTA); Rental Housing Act 50 of 1999 (RHA).

¹⁹ 4 of 2000. For other rights legislative schemes that regulate the right against discrimination, see the Employment Equity Act 55 of 1998, Consumer Protection Act 68 of 2008; National Credit Act 34 of 2005.

²⁰ 2 of 2000. For other rights legislative schemes that balance the conflict between access to information and privacy, see the Protected Disclosure Act 26 of 2000; Protection of Personal Information Act 4 of 2013.

Figure 7 tabulates information on the three selected rights legislative schemes. The first part of the table identifies the relevant constitutional provision and provides an overview of how Parliament translated the provision into legislation. The table thereafter summarises how the legislation balances conflicting rights, and it does so by splitting relevant balancing frameworks into procedural and substantive components. The final part of the table outlines the discretionary remedial powers of the judiciary.

		Housing Eviction Act	Equality Act	Information Act
Constitutional Mandate	Constitutional Provision	<p>Section 26(3) of the Constitution:</p> <p>No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.</p>	<p>Section 9(4) of the Constitution:</p> <p>No person may unfairly discriminate directly or indirectly against anyone on one or more grounds [including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth]. National legislation must be enacted to prevent or prohibit unfair discrimination.</p>	<p>Section 32(1)(b) of the Constitution:</p> <p>Everyone has the right of access to any information that is held by another person and that is required for the exercise or protection of any rights.</p> <p>Section 32(2) of the Constitution:</p> <p>National legislation must be enacted to give effect to this right [...].</p>
	Legislative Translation of Constitutional Provision	<p>The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (Eviction Act) operates as the principal legislative scheme for housing eviction applications. Its application is however residual, as it applies only to those eviction applications not covered by a more specific statutory mechanism (i.e. ESTA or RHA). In practical terms, the Eviction Act covers all residential evictions in urban areas as well as evictions in rural areas where the occupier never received consent to reside. The preamble of the Act reflects the purpose of the legislative scheme, as well as the difficulty in reconciling two clashing constitutional rights. The aim of the Eviction Act is to regulate evictions ‘in a fair manner’ by protecting both the section 25 right of property owners to apply for eviction orders ‘in appropriate circumstances’ and the section 26 right of unlawful occupiers to enjoy access to an adequate home.</p>	<p>In compliance with section 9(4) of the Constitution, section 6 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act) prohibits state and private actors alike from unfairly discriminating against any person.</p> <p>The Act defines discrimination broadly to encompass any act or omission — including policy, law, rule, practice, condition or situation — which directly or indirectly (i) imposes a burden, obligation or disadvantage or (ii) withholds a benefit, opportunity or advantage from any person on one or more of the prohibited grounds. The Act defines prohibited grounds to include all the grounds listed in the Constitution, but extends to include any other ground where the discrimination (i) causes or perpetuates a disadvantage, (ii) undermines human dignity, or (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to an expressly listed ground.</p>	<p>The Promotion of Access to Information Act 2 of 2000 (Information Act) gives effect to section 32 of the Constitution. The Act distinguishes between public and private bodies. The definition of a public body mirrors the definition of an organ of state as described in section 239 of the Constitution, while a private body includes: (i) any natural person or partnership that carries or carried on any trade, business or profession, but only in such a capacity; or (ii) any former or existing juristic person.</p> <p>Section 50 legislates that a requestor must be given access to any record held by a private body if (i) the record is required for the exercise or protection of any right; (ii) the procedural requirements of the Act are complied with; and (iii) access is not refused in accordance with a listed ground. If the requestor is a public body, access is only mandatory if disclosure is in the public interest.</p>

		Housing Eviction Act	Equality Act	Information Act
		Each of the legislative schemes give effect to their respective constitutional provisions through a series of legislative remedies, which can be split into procedural and substantive components. These constitutional rights legislative schemes aim to reconcile the protected constitutional right and competing interests (which often is another constitutionally protected interest).		
Legislative Balancing Framework	Procedural Component	<p>In accordance with section 4 of the Eviction Act, at least 14 days prior to a court entertaining an application, a landowner (or another person in charge of the land) must provide the unlawful occupiers as well as the municipality in which the occupiers reside notice of their intention to seek an eviction. The notice must, amongst other things, list the grounds on which the proposed eviction is sought. The notice must furthermore inform the occupiers that they have the right to appear before the court as well as the right to apply for legal aid. Service of the notice must be effected in the usual manner, namely that each person potentially affected by the order must receive notice. A court may however prescribe a different procedure if there is a more convenient method available, but such an order is still subject to the proviso that unlawful occupiers must have received an adequate notice to the defend their case.</p> <p>Section 7 of the Eviction Act provides that the municipality may appoint a mediator to settle disputes between private landowners and occupiers (with the aim to resolve disputes in a time-efficient and cost-effective manner).</p>	<p>Section 13 of the Equality Act assigns the onus of proof. A complainant need only establish a prima facie case of discrimination. The onus then shifts to the respondent to prove one of the following to escape liability: (i) the alleged discrimination did not take place; (ii) the discriminatory conduct is not based on a prohibited ground; or (iii) the discrimination is fair.</p> <p>Complaints must be lodged before the equality court (which is the high court following a more specific procedure, as set out in the Equality Act). Section 20 of the Equality Act empowers the clerk of the equality court to refer the dispute to an alternative appropriate forum for resolution. The decision to refer a matter must be made having considered all ‘relevant circumstances’ including the personal circumstances of the parties, accessibility to alternative forums, the wishes and needs of the parties, and the views of the alternative forums. The equality court must resolve the dispute if the alternative forums are unable to do so.</p>	<p>The Information Act prescribes a detailed set of procedures that private bodies and requestors must follow in facilitating the process of gaining (and refusing) access to records. Also, as a general rule, a private body is permitted to levy a fee in order to recuperate costs associated with searching and preparing records.</p> <p>After lodging a request for a record, section 56 of the Information Act requires private bodies within 30 days to notify the requestor of a decision. If access is granted, the notice must contain information on the fees, the manner in which access will be granted, and the right of a requestor to apply to a court for an exemption of fees. If access is refused, the notice must state adequate reasons for the refusal (including the provisions of the Information Act relied upon), as well as the right to appeal the decisions (including the procedure)</p> <p>Section 71 protects third parties, and instructs private bodies to take reasonable steps to inform anyone to whom the record relates. This notice must inform third parties on how to make representations prior to disclosure.</p>

		Housing Eviction Act	Equality Act	Information Act
Legislative Balancing Framework	Substantive Component	<p>An eviction order may only be granted if a court deems it ‘just and equitable’ to do so having considered ‘all the relevant circumstances’. Section 4 of the Eviction Act prescribes a non-exhaustive list of factors to consider. This includes the rights and needs of the elderly, children, disabled persons and households headed by women’. If occupation has lasted for longer than six months, the Eviction Act further demands an enquiry into whether or not alternative land or housing has been made available or can reasonably be made available by the municipality, other organ of state, or landowner. Although not expressly mentioned in the Act, the consideration into whether alternative land is available means that the landowner must join the relevant municipality to the proceedings.</p> <p>If a court is satisfied that it is just and equitable to grant an eviction order, section 4(8) of the Eviction Act requires the court to determine a ‘just and equitable date’ on which the unlawful occupiers must vacate the land, as well as a date on which such an order may be carried out. This enquiry must also have regard to all relevant circumstances, including the period the unlawful occupiers have resided on the land.</p>	<p>Section 14 of the Equality Act lists the factors that must be taken into account to determine whether or not an act of discrimination is fair. This includes: (i) the context in which the discrimination occurred; (ii) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, and that the discrimination is intrinsic to an activity that serves and achieves a legitimate purpose; (iii) whether there are less restrictive and less disadvantageous means to achieve the purpose; (iv) the nature and extent of the discrimination, including the impact of the discrimination on the complainant; (v) the position of the complainant in society, and whether he or she belongs to a group that suffers from patterns of disadvantages; and (vi) whether the discrimination impairs human dignity; and (vii) the extent to the respondent has taken reasonable steps to address the disadvantage and accommodate diversity. It bears noting that these factors reflect the contents of the section 9 equality clause, the section 16 freedom of speech clause (which outright prohibits hate speech), and the section 36 general limitation clause.</p> <p>The Equality Act provides that measures taken to advance previously disadvantaged groups are not unfair, and furthermore stipulates that acts of hate speech can never be considered as fair.</p>	<p>The information Act effectively creates a presumption in favour of disclosure, as it requires the holder of the information to justify refusal. There are seven main grounds listed upon which a private body must or may refuse access to information. Broadly summarised, these grounds include private information about natural persons, trade secrets, information that could hamper commercial competition and financial interests, the safety of a particular individual or the public, and whether there is a contractual duty of confidence towards another individual or entity.</p> <p>However, the Information Act continues to provide that some of these exemptions do now apply when the records of information evidence a ‘substantial contraventions’ or ‘failure’ to comply with law, or where there is an imminent and serious risk to public safety or the environment. Furthermore, disclosure is mandated when the ‘public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision’.</p>

		Housing Eviction Act	Equality Act	Information Act
		Each of the legislative schemes provides the courts with wide remedial powers to issue any order that is ‘just and equitable’ or ‘appropriate’.		
Legislative Balancing Framework	Judicial Remedies	The ‘just and equitability’ remedy, as set out above.	Section 21 empowers the equality court to make any ‘appropriate order in the circumstances’, which may include: (i) interim and declaratory orders; (ii) the payment of damages, which could be for financial loss, the impairment of dignity, or emotional suffering; (iii) an order directing the prohibition of certain activities; (iv) an order for the implementation of special measures to address the unfair discrimination; (iv) an order for an unconditional apology; (v) an order for the discriminator to undergo an audit of policies and practices as determined by the equality court (vi) forms of deterrent punishments, including a recommendation to relevant bodies that a licence be revoked; and (vii) an order directing the National Prosecuting Authority to institute criminal proceedings.	Section 82 of the Information Act empowers courts to grant any order that is ‘just and equitable’. This includes confirming, setting-aside, or amending the decision of the private body. The courts are also entitled to ‘peak’ into the records (without disclosing information to any person) in order to determine whether or not the impugned record does in fact contain information upon which access must or may be denied.

Figure 7: Tabulated summary of the Eviction Act, Equality Act, and Information Act

2.2.1 Similarity (between legislative and judicial balancing)

The balancing framework contained within constitutional rights legislation shares a similar feature of the judicial balancing process. Rights legislation also steers away from fixed outcomes, and instead adopts versions of process-based balancing that allow for the evaluation of competing interests within the facts and context of each particular case. For example, the Eviction Act requires the courts to determine if it is ‘just and equitable’ in the circumstances to grant an eviction order. And, should a court conclude that it is, the Act requires the tailoring of a ‘just and equitable’ order.²¹ The Equality Act similarly provides the courts with wide latitude to determine whether or not a particular discriminatory act is fair, and, if it is found not to be, the Act permits the courts to make ‘any appropriate order in the circumstances’.²² The Information Act adopts a different route, but still reaches a similar outcome. The Information Act prescribes a fixed list of circumstances under which a private body must or may refuse access to record. But the Act continues to provide that a private body must nevertheless disclose a record whenever the public interest ‘outweighs the harm contemplated’ by the provisions upon which a private body may otherwise refuse access.²³ The Information Act also enshrines the judicial power to craft ‘just and equitable’ remedies.²⁴

The repeated incorporation of broad evaluative exercises into constitutional rights legislation is not only on account of legislative policy. The Constitution either demands or strongly encourages process-based balancing within legislation, which is due to three constitutional provisions.

First, section 39(2) of the Constitution instructs the courts to interpret all legislation in a manner that promotes the spirit, purport, and objects of the Bill of Rights. The provision effectively creates a statutory presumption that the legislature intends to promote and safeguard all constitutional rights in the exercise of their law-making role. The Constitutional Court has accordingly held that courts must seek to give effect to the values that underlie the Bill of Rights when reading legislation, and, to the extent that the

²¹ Eviction Act ss 4(7), 4(8).

²² Equality Act ss 14, 21.

²³ Information Act s 70(b).

²⁴ *ibid* s 82.

language of an impugned legislative scheme permits, courts must choose an interpretation that does not limit a right as opposed to one that does.²⁵

The impact of section 39(2) on rights legislation is neatly illustrated by a group of high court judgments adjudicated under the Eviction Act. These judgements investigated whether the definition of ‘unlawful occupier’ in the Act included only occupiers who unlawfully took possession of the land or whether the protection of the Act included those occupiers who were once lawful occupiers but subsequently became unlawful occupiers. In other words, does the Eviction Act protect ex-tenants, ex-mortgagors, or ex-owners who had lost the right to ownership of their home due to the enforcement of a debt? Nearly all of the high court judgments answered this question in the negative.²⁶ These judgements rested their conclusion on the drafting history of the Eviction Act including the legislature’s intended scope of the Act. The legislature — or, more accurately, the ministerial department responsible for the administration of the Eviction Act — never intended the Eviction Act to protect occupiers who were at one stage lawful occupiers.²⁷ There were other legislative schemes — including ESTA and the Rental Housing Act — that provided protection to occupiers whose right to reside had terminated.²⁸ Moreover,

²⁵ *Makate v Vodacom* 2016 (4) SA 121 (CC) para 89; *Daniels v Campbell* 2004 (4) 5 SA 331 (CC) para 43.

²⁶ See *Absa Bank v Amod* [1999] 2 All SA 423 (W) at 428D–430D; *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) at 599A; *Betta Eindomme v Ekple-Epoh* 2000 (4) SA 468 (W) at 473I; *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2001 (4) SA 759 (E); *Sentrale Karoo Distriksraad v Roman* 2001 (1) SA 711 (LCC); *Esterhuyze v Khamadi* 2001 (1) SA 1024 (LCC); *Ellis v Viljoen* 2001 (4) SA 795 (C) at 801G–802B. For judgments reaching the opposite conclusion, see *Bekker v Jika* 2002 (4) SA 508 (E) at 523D–524D; *Van Zyl v Maarman* 2002 (1) SA 957 (LCC); *Ridgway v Janse van Rensburg* 2002 (4) SA 187 (C) at 190A–B.

²⁷ Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill [B8-2008]. The accompanying memorandum to the Bill outlines the objects of the amendment Bill. It notes the SCA decision of *Ndlovu*, and that it—

was not the intention that the Act should apply to tenants and mortgagors who default in terms of their prior agreements with landlords and financial institutions, respectively. The Act should cover only those persons who unlawfully invade land without the prior consent of the landowner or person in charge of land. It has thus been necessary to amend [the Act] to state specifically that the Act does not apply to a person who occupied land as a tenant, in terms of any other agreement or as the owner of land and who continues to occupy despite the fact that the tenancy or agreement has been validly terminated or the person is no longer the owner of the land.

The Bill however lapsed before the National Assembly during its second reading. See Proceedings of the National Assembly, *Hansard*, 21 August 2008, 157. While it appears that the state does not intend to initiate a similar amendment act in the future, it bears noting such an amendment would in all likelihood fail to pass constitutional muster. See *Sarrahwitz* judgment, discussed in note 36 below.

²⁸ See minority judgment in *Ndlovu v Ngcobo* [2002] 4 All SA 384 (SCA): para 2 (Nienaber JA); para 62 (Olivier JA).

some of these judgments reasoned, if the legislature intended to reverse the common law ownership right, it should have done so in a more express manner.²⁹ The Supreme Court of Appeal overturned these rulings in *Ndlovu v Ngcobo*.³⁰ The court relied upon section 39(2) of the Constitution to reconstruct the intention of the legislature. That the legislature actually intended to protect only one category of unlawful occupiers is by itself an insufficient reason to deny statutory protection to other categories (provided the language of the legislative scheme permits inclusion). The court concluded that the main function of the section 26 housing right is to lessen the plight of the poor, and, in that spirit, there ‘seems to be no reason in the general social and historical context of this country why the Legislature would have wished not to afford this vulnerable class the protection of the Eviction Act’.³¹

Second, the section 36(1) rights-limitation analysis promotes judicial discretion within legislation. The translation of private constitutional duties into legislation is likely to limit a constitutional right, and, as a result, the legislature must be able to show that the limitation is ‘reasonable and justifiable’ having taken ‘into account all relevant factors’. Legislation that does not outright limit a constitutional right — but rather creates a presumption in favour of one constitutionally protected interest but nevertheless affords the judiciary a final discretion to determine the interest to favour after enquiring into the facts of the particular case — is far more likely to survive constitutional review.³² It is difficult to justify absolute limits on a right (outcome-based balancing) when it can be shown that process-based balancing (which permits a degree of judicial discretion) is a narrower and less restrictive way to achieve the legislative objective. This claim operates on a scale. It applies more forcefully to legislative schemes that cast their objectives in broad terms, and, as a result, apply to a wider array of varying disputes. Legislation that has a smaller scope of application is more likely to survive constitutional review; their limits upon rights are often narrower and it is also easier to evaluate and predict future results in the abstract. Like most other constitutional rights legislation, the Eviction Act, the Equality Act, and the Information Act are legislative schemes that have an expansive scope of application.

²⁹ *ibid* paras 61, 71 (Olivier JA).

³⁰ *ibid*.

³¹ *ibid* para 16 (majority judgment).

³² For example, see *Opperman* (n 10) (provisions of the National Credit Act (n 19) were declared unconstitutional for limiting judicial discretion).

Writing in the context of a rights legislative scheme, the Constitutional Court cautioned that enquiries into the scope of any constitutional obligation upon private individuals and entities is a complex issue, and one that cannot be reduced to a binary all-or-nothing approach.³³ The scope of any obligation is most often ‘found on a continuum that reflects the variations in the respective weight of the relevant considerations’.³⁴ And, to this end, unless the state can produce a compelling state justification not to do so, rights legislation must afford a sufficient amount of protection to constitutionally protected interest so as to allow final arbiters (i.e. judges) latitude to reconcile clashing rights within the context of each particular case. The *Jafta* decision illustrates this point.³⁵ Recall from the discussion in chapter four, the court declared unconstitutional a legislative provision that prevented the courts from considering all relevant circumstances prior to the sale of a home in order to satisfy a debt (the state’s interest in promoting debt recovery through an automatic and expedient process was found not to be a compelling justification).³⁶

Third, section 172(1)(b) of the Constitution empowers the judiciary with broad remedial powers to ‘make any order that is just and equitable’ when deciding a constitutional matter, which, the Constitutional Court has repeatedly confirmed, permits the courts to consider a wide array of considerations in order to craft an effective and efficient remedy.³⁷ The Bill of Rights confirms this discretionary remedial power. Section 38 of the Constitution reiterates that the judiciary has the power to ‘grant appropriate relief’ in order to remedy or prevent the infringement of a constitutional right. These two provisions explain why constitutional rights legislation employ the phrases ‘just and equitable’ and ‘appropriate’ or uses comparable open-ended phrases like ‘fair’ and ‘reasonable’ when defining the remedial powers of the courts.³⁸ Parliament

³³ *Baron v Claytile* 2017 (5) SA 329 (CC) para 36.

³⁴ *ibid.*

³⁵ *Jafta v Schoeman* 2005 (2) SA 140 (CC).

³⁶ See also *Sarrahwitz* (n 13) para 49 (equally vulnerable persons must receive the same legal protection unless the state can offer a compelling justification). At paragraph 85 of the judgment, the concurring opinion advises not to read the *Sarrahwitz* holding too broadly because doing so would significantly curtail the capacity of the legislature to create distinctions between different groups of people in the way Parliament feels best fit to meet social needs.

³⁷ See *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* 2005 (3) SA 280 (CC) para 74.

³⁸ The two legislative schemes discussed in chapter six further illustrate the broad discretionary investigations and remedies contained within legislation. ESTA only allows an eviction order if it is ‘just and equitable’. ESTA and the RHA also restrict the power to contract. These legislative schemes only allow a property owner to terminate a right to reside if it is ‘just and equitable’

recognises that discretionary remedial powers within constitutional disputes is a constitutional requirement, and that any legislative scheme is liable for invalidation should it remove or curb this wide, flexible, and discretionary power.³⁹ It is of interest to postulate here that the discretionary remedial powers of the courts have encouraged the ever-increasing application of constitutional rights to the South African private law. A perennial concern is that the horizontal application of rights undermines human autonomy, which both constitutional rights and the common law aim to safeguard. The wide remedial discretion of the courts ameliorates this fear to a large extent. Even though a constitutional right may impose an obligation upon a private individual and entity, a court, after considering the particular circumstances of the case, may deem it appropriate to mould a remedy that effectively lessens or even removes the burden on the duty bearer.⁴⁰

2.2.2 Difference (between legislative and judicial balancing)

On the other hand, however, the balancing framework contained within legislation departs from the judicial equivalent. The broad evaluation of competing constitutional rights and other interests within legislation is built on top of a series of procedural and substantive components, which is a feature that nudges rights legislation towards the outcome-based side of the balancing spectrum. These components take the form of (i) fixed requirements that must be complied with before a litigant is entitled to invoke a statutory cause of action or defence and (ii) factors that arbiters must consider when resolving a dispute. In accordance with the Eviction Act, for example, the failure of a landowner to comply with notice requirements or disclose prerequisite information will in all likelihood result in the court denying an eviction order.⁴¹ The Eviction Act further provides an array of criteria that the courts must consider when deciding whether or not an eviction would be ‘just and equitable’ in the circumstances. This includes the availability of alternative housing, the interests and needs of children, women, and the

(ESTA) or not ‘unfair, unreasonable, or oppressive’ (RHA) to do so. Each of the legislative schemes provides the courts with a wide remedial power to issue any order that is ‘just and equitable’ given the circumstances of the case.

³⁹ See *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 97; *Minister of Health v Treatment Action Campaign (No. 2)* 2002 (5) SA 721 (CC) para 101; *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC) para 28; *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 38.

⁴⁰ See *Daniels v Scribante* 2017 (4) SA 341 (CC) para 53 (a constitutional obligation upon a private actor ‘may or may not arise, depending on the exercise of discretion by a court’).

⁴¹ See *Baron* (n 33) paras 33, 46–47.

elderly, as well as the period of the occupation. The Equality Act similarly prescribes mandatory procedural requirements, and furthermore lists an array of factors that must be considered in determining whether or not a discriminatory act is fair.⁴²

These legislatively prescribed procedural and substantive requirements may at times prove more onerous upon litigants wishing to vindicate a constitutional right, but they also produce two significant advantages. First, the increased precision and detail of the balancing framework better guides the balancing of conflicting interests, which, in turn, better promotes predictable and consistent outcomes. Second, the more structured balancing framework has the propensity to narrow the scope of the dispute. Litigating parties need only focus on the requirements they contend are lacking or on the statutory-prescribed factors they believe were not given adequate consideration.⁴³ The Information Act can illustrate this point. The Act lists and details all of the grounds upon which a private body must or may deny access to a record. In doing so, the Information Act renders it relatively easy to identify whether a particular requestor is entitled to a privately held record.

In contrast, although each judicial balancing process also provides factors to guide its application, the judicial law-making process is unlikely to produce a balancing framework that is as tailored, detailed and precise as the framework contained in legislation. The reason for this difference is attributable to two core reasons. First, the judicial law-making toolkit is smaller than that of the legislature. The judicial authority to craft a balancing process — which includes identifying the factors that must be considered when applying the process — must be derived from constitutional principles alone. In other words, when the court balances conflicting right norms without the

⁴² ESTA and the RHA also prescribe an array of requirements and guidelines to facilitate the resolution of the dispute. The legislative schemes establish notice periods, the mandatory notification of certain actors, and the declarations of the facts and source of dispute. They also list considerations that an adjudicator must consider. This includes the reason for the occupation of the premises, the socio-economic status of the occupier, and the conduct of the owner of the property. For additional examples, see Basic Conditions of Employment Act 75 of 1997 (the Act gives effect to the section 23(1) constitutional right to fair labour practices by providing minimum requirements for employment like leave and work time as well as creating institutions and procedures for the enforcement of labour rights); Domestic Violence Act 116 of 1998 (the Act gives effect to the rights to equality and freedom and security of the person, and defines what constitutes domestic abuse and legislates an array of procedures and actions for protecting spouses or partners in an abusive relationship).

⁴³ For two recent examples of how ESTA narrowed the dispute between landowner and occupier, see *Baron* (n 33) (the court only had to determine whether the alternative accommodation made available by the municipality was appropriate); *Snyers v Mgro Properties* [2016] 4 All SA 828 (SCA) (the SCA denied an eviction application as procedural requirements were not met).

assistance of the elected branches of government, the courts need a legal justification for limiting one constitutional right norm in favour of another. Chapter five identified the primary source of this legal justification: although constitutional rights protect legal powers, these powers must be controlled to ensure that they are exercised in a manner that does not unduly and without adequate justification infringe upon the rights of others. The legislative law-making toolkit is far larger. While legislation must comply with the commands of the Constitution, including section 36(1) and section 172(1)(b) as outlined above, the task of formulating legislative remedies is not confined to legal considerations alone. As outlined in chapter one, the legislative law-making process benefits from public participation, government policy, and arbitrary line drawing (why, for example, does the Information Act require a private body to provide a decision within 30 days, and not 25 or 35?).⁴⁴ These benefits innate to legislation allows for the creation of balancing frameworks that are more detailed and precise than the judicial balancing process. Second, the context in which the judiciary and the legislature exercise their law-making powers is different. In contrast to the legislative law-making process, the judiciary only ever initiates its law-making powers to solve a particular dispute between a few individuals and entities. The courts are thus able to prescribe broad principles and frameworks, and only focus on those narrow aspects of the particular case that may require legal development in order to resolve the case at hand. The law is left to develop on a case-by-case basis, which is done with the benefit of specific facts and actual outcomes. Parliament's motivation for creating law is different. It seeks to meet broad policy and legal objectives, and, in order to do so, the legislature must create sufficiently structured and detailed frameworks to resolve all future disputes that fall under the purview of the particular legislative scheme. The legislature does not enjoy the luxury of tailoring laws on an ad hoc basis in order to ensure the state's policy objectives are met within each particular legal dispute.

2.3 *Fixed rules in judicial law-making*

Although the legislative law-making process is better positioned to produce more detailed and structured balancing frameworks, the pivot towards legislation is not always needed to resolve conflicting rights. The case law analysed in Part B of the thesis illustrated that the judicial balancing process is not invariably at risk of generating balancing exercises

⁴⁴ Chap 1, sec 2.1.

that are too vague and abstract for predictable and consistent application, and, furthermore, that limited amounts of legal uncertainty within the judicial balancing process is not fatal. The choice between legislation and the common law is therefore dependent on the court's appetite for enhanced legal certainty, as well as an assessment on whether or not the legislature is in fact prepared to enact legislation (to date, political will has not proved problematic as the South African Parliament has always complied with judicial orders to promulgate legislation).

It also bears noting that there are a few instances where the judicial balancing process yields results that are no more uncertain than legislation. And, as a result, there is no need to pivot towards legislative remedies. Chapter five identified three examples of where judicial balancing resulted in fixed rules; namely (i) no other protected legal interest, (ii) monopolised power over a core freedom interest, and (iii) choices of intimate association. Here, the court held that the Constitution demands a particular outcome regardless of the facts of the case, which means that there is no need for either the courts or the legislature to engage in process-based balancing. *Ramakatsa v Magashule* is an additional example of where the judicial law-making pathway created a fixed rule. As discussed in chapter seven, the court interpreted section 19(1)(b) of the Constitution to impose a procedural obligation upon political parties to facilitate the participation of members within the internal activities of the party. Significantly, this procedural guarantee does not compete against any other constitutionally protected interests (the reasoning of the *Ramakatsa* judgment suggests that the Constitution affords zero protection to a political party's preference for autocratic practices, which was permitted under the common law of contract). Given that no political party or member can claim an exception to this procedural right, the *Ramakatsa* court was able to recognise a fixed rule. There was accordingly no need to create context-specific balancing frameworks, and, as such, the legislature would not have been able to deliver a more structured and certain outcome.

3 **Benefit two: legislation contains government policy**

Incongruity is the second limit of the judicial law-making toolkit. The private common law rests on the foundational belief that each individual must be afforded a sufficient amount of autonomy so as to allow everyone the freedom and responsibility to manage their own resources and pursue their own interests. The common law safeguards this negative conception of freedom through a series of mostly procedurally neutral rules (i.e. the requirements for the creation of a legal agreement or the transfer of ownership).⁴⁵ Private law interferes in the exercise of autonomy only in those instances where it is necessary to hold individuals responsible for their actions or to repulse undue encroachments on another's autonomy.⁴⁶ The need to safeguard human autonomy is also a core rationale for most other constitutional rights. And, when this shared philosophical DNA is present, the reframing of the common law through the prism of the Constitution proves a manageable task for the courts.

But, in some instances, the underlying objectives of the common law and constitutional rights are too dissimilar. As a result, the common law struggles to develop in a way that satisfies both the demands of the Constitution and the internal logic and doctrine of the common law. The conflict between property and housing rights is such a case under certain conditions. These rights clash in a politically fraught arena, where the underlying problem is no so much responsibility for individual actions but larger systemic problems of inequality and poverty.⁴⁷ Consider once more the application of the expanded-substantive reading of the housing right to the common law. Not only would the expanded scope of the obligation place considerable stress on the autonomy interests upon which the common law is built, the expanded reading would require judges to enter

⁴⁵ See AJ van der Walt, *Property in the Margins* (Hart 2009) 17–18 (the common law is sometimes described as apolitical, but that is a fiction; it is just that the policy objectives of the common law are hidden by long-standing doctrinal rules, which proves problematic whenever the Constitution requires economic and social reform). See also *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC) para 151 (no longer can the value-laden content of the law be denied). For the view that the common law must be free from socio-political influence (and therefore should not be used to remedy the ill effects of apartheid), see Johan Neethling, 'A Vision of the Future of the South African Private Law – Full or Reconciliatory Synthesis?' in Annél van Aswegen (ed), *The Future of South African Private Law* (Unisa Press 1994) 1, 3; JM Potgieter, 'The Role of the Law in a Period of Political Transition: The Need for Objectivity' (1991) 54 *THRHR* 800, 802.

⁴⁶ Chap 4, sec 2.

⁴⁷ See *Daniels* (n 40) para 165 (the horizontal application of rights cannot be used to saddle innocent private persons with 'the duty to remedy the wrongs of the state').

the realm of formulating economic policy. Access to land and housing are immensely complicated social problems, and there is no universal solution to the problem (consider the fact that elections are mainly contested over economic policies, and, more specifically, plans over the distribution of limited resources). The common law is simply not built to accommodate this objective without significant alteration to its structure.⁴⁸ And, as the Constitutional Court has warned, ‘fundamental changes to the fabric of the common law and customary law are often more appropriately made by way of legislation’.⁴⁹

The *Jaftha* judgment further illuminates how the problem of incongruity constrains judicial law-making powers. This decision is amongst the Constitutional Court’s most notable attempts to reconcile the housing right and other private law rights without the assistance of the elected branches of government. To recall, despite arguments from the state to the contrary, the court remedied a statutory provision by ordering that courts had to consider ‘all relevant circumstances’ before a home is sold to satisfy a debt. The court did not prescribe an exhaustive list of factors, but rather outlined eight broad considerations. These factors include the individual circumstances that led to the incurrence of the debt, any attempts by the debtor to repay the debt, the relative financial position of the parties, whether the debtors enjoy another source of income to pay off the debt, whether the debtor voluntarily mortgaged the property, whether either of the parties acted recklessly in contracting for the debt, the measures taken by the creditor to enforce the debt, and any other factor relevant to the particular facts of the case.⁵⁰ It is telling that all of the factors except one (relative financial position) pertain to individual autonomy interests and responsibility for those decisions. Although structural inequality and other macro-social problems give rise to the problem, these larger economic complexities are absent from this judicially invented enquiry.

But this is not a limit of the legislative law-making toolkit. Legislation is derived from government policy, which is formulated based on how best to distribute and exploit limited resources. The discussion that follows shows how government policy assists in resolving conflicting rights.

⁴⁸ See *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 66 (new constitutional remedies are preferable if the Constitution would stretch the common law ‘beyond recognition’).

⁴⁹ *Mighty Solutions* (n 6) para 44.

⁵⁰ *ibid* paras 41, 58, 60.

3.1 Government policy drives legislation

How best to provide access to land — which includes providing access to goods that are attached to land such as housing and the provision of water and electricity — is amongst the most fraught debates within the South African political landscape. And, like all other socio-economic rights cases, it is this politically charged backdrop that animates and explains the Constitutional Court's decision in *President of the Republic v Modderklip Boerdery*.⁵¹ A private landowner instituted an eviction application for the removal of approximately 18 000 unlawful occupiers, and, although the order was granted in accordance with the Eviction Act, the state failed to assist in the implementation of the order. The size of the informal settlement continued to grow at a rapid rate, and eventually the cost of removing the approximately 40 000 settlers outgrew the value of the property. The landowner repeatedly sought the assistance of the state but to no avail. This led the landowner to institute action against the state for a sum of damages to reclaim the lost value of the property. The SCA sided with landowner, and ordered the payment of constitutional damages on the basis that the inaction of the state infringed upon both the property rights of the landowner and the access to adequate housing rights of the unlawful occupiers.⁵² The logic of the SCA was as follows: (i) the state violated the occupiers' section 26 right to access adequate housing by not providing alternative land for accommodation, and, in doing so, (ii) the state also breached the landowner's property right as the ability of the landowner to enjoy the full use of their property right was now dependent on the state fulfilling their obligations under the housing right.⁵³

The Constitutional Court confirmed the remedy of the SCA, but did so on a different ground. The court held that the inaction of the state amounted to a violation of the section 34 right to access courts. The right aims to secure the rule of law, and requires the state not only to provide mechanisms for enforcing rights but also to take reasonable measures to ensure that large social disruptions do not occur when enforcing a legal remedy. The inaction of the state failed both pillars in this matter. First, the state effectively denied the landowner a legal remedy to which the landowner was entitled (in accordance with the Eviction Act).⁵⁴ Second, the state failed to take reasonable steps to

⁵¹ 2005 (5) SA 3 (CC).

⁵² *Modder East Squatters v Modderklip Boerdery* [2004] 3 All SA 169 (SCA) paras 22, 28. The SCA held that damages had to be calculated in accordance with the Expropriation Act 63 of 1975.

⁵³ *Modder East Squatters* (n 52) paras 21–22.

⁵⁴ *Modderklip* (n 51) para 50.

manage the social problem, which could have included purchasing the property or relocating the unlawful occupiers when the landowner initially approached the state for assistance.

The *Modderklip* judgement provides no clear explanation for why it was ‘unnecessary’ to resolve the dispute through the application of property and housing rights, or why the doctrinal shift to the section 34 right to access courts was more preferable.⁵⁵ But it is possible to infer the reasons. The SCA judgment was premised on the state’s constitutional obligations to resolve eviction disputes in the private sphere, and the reasoning of the appellate court suggests how similar cases would be resolved in the future: a landowner would be entitled to damages from the state whenever unlawful occupiers fail to comply with an eviction order. This legal precedent placed immense financial strain on the state, and furthermore shackled the efforts of the state to develop political solutions for managing the (lack of adequate) housing crisis.⁵⁶ The *Modderklip* court was reluctant to follow this approach, and the judgment demonstrates that the Constitutional Court is unwilling to instruct the state on how it should resolve tensions between private property rights and access to housing. From this viewpoint, the deflection in *Modderklip* was smart. The court effectively ordered constitutional damages on the basis that the state failed to assist in the implementation of its own legislation, which, one can assume, is created from a government policy that seeks to manage the problem of unlawful occupiers settling on private property. The *Modderklip* court did not need to develop its own framework for resolving these two conflicting constitutional rights. The award for damages flowed from the finding that the state did not comply with its own framework for managing the dispute (i.e. the Eviction Act entitled the landowner in this instance to a remedy), which, in turn, created a threat of social instability.⁵⁷

⁵⁵ *ibid* para 25.

⁵⁶ See Theunis Roux, *The Politics of Principle* (2013 CUP) 328–31.

⁵⁷ In other non-housing disputes pertaining to the state’s failure to fulfil their socio-economic rights obligations, the courts have been willing to order constitutional damages. See *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA) (the SCA confirmed an order for damages granted by the high court after finding that there was an ‘endemic breach’ and not merely a deviation for a constitutional standard in fulfilling the right access social security); *Oppelt v Head: Health, Department of Health Provincial Administration* 2016 (1) SA 325 (CC) (the Constitutional Court ordered the state to pay damages when a hospital was found to have failed to provide emergency medical treatment — due to administrative protocols and not a shortage of health resources — which was held to be a violation of the section 27 right not to be denied emergency medical treatment).

The *Modderklip* judgment shows that the courts rely upon the capacity of government to solve tensions that arise from conflicting constitutional rights. Another term for these solutions is government policy, and it is formulated on the basis of state research, expertise, and assumptions on how best to manage limited resources in society. There is no legal or political standards or framework on how government policy ought to be developed, and the process of government policy-making rarely produces one clear outcome. Despite the uncertainty, the job of government is to evaluate and choose between more or less desirable options, and once decisions have been made, the state must translate policy into a network of legal requirements that are sufficiently clear and capable of consistent application.⁵⁸ In comparison to the judicial law-making process, the government policy that drives the creation of legislation is what makes the legislative law-making process both unique and effective.

Government policy has also benefited the constitutional rebuilding of private law. Two examples will suffice. The first comes from the Equality Act, which shows an example of how past experiences enhanced the effectiveness of this legislative scheme. The drafters of the Equality Act reviewed antidiscrimination legislation from around the globe, and concluded that these acts suffered from a significant shortcoming:⁵⁹ complaints of discrimination rarely succeed unless the discriminatory act is overt and unequivocal.⁶⁰ Complainants find proving discrimination difficult for a variety of reasons, but one of the main reasons is that it is near impossible for a complaint to explain a respondent's motives and actions. Although a shift in onus appears not to be a requirement of the Constitution, the Equality Act remedies this limit by substantially reducing the complainant's burden of proof.⁶¹ Section 13 of the Act provides that a complainant need only establish a 'prima facie case of discrimination'.⁶² Once this relatively low threshold is met, the onus shifts to the respondent. The Act provides that a

⁵⁸ David Feldman, 'Injecting Law into Politics and Politics into Law' (2005) 34 *Common Law World Review* 103, 104.

⁵⁹ Johann Anton Kok, *A Socio-legal Analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (LLD Thesis, University of Pretoria, 2007) 112, 136–42.

⁶⁰ See generally Anna Beale, 'Core Rights and Duties' in John Wadham and others (eds), *Blackstone's Guide to the Equality Act 2010* (3rd edn, OUP 2016) 31, 53; Peter Bailey and A Devereux, 'The Operation of Anti-Discrimination Laws in Australia' in David Kinley (ed), *Human Rights in Australian Law* (The Federation Press 1998) 292, 308.

⁶¹ See *Manong v City Manager, City of Cape Town* 2009 (1) SA 644 (EqC) para 12 (analysis of how the Equality Act lowers the evidentiary threshold for the complaint, as compared to the onus of proof set by section 9 of the Constitution).

⁶² Equality Act s 13(1).

complainant will have proved a case of unfair discrimination unless the respondent can demonstrate that (i) the discrimination did not take place, (ii) the discriminatory conduct was not based on a prohibited ground, or (iii) the discrimination was fair.⁶³

The second example is the Rental Housing Act (RHA), which must be assessed alongside the series of *Maphango* judgments discussed in chapter six. To recall, the RHA serves as the primary legislative scheme for the regulation of the rental housing market. Its objectives are twofold. The first is to meet the constitutional obligations of the state. This includes not only the duty to protect the access to housing right from undue interference by third parties, but also the duty upon the state to take reasonable measures to achieve the progressive realisation of the section 26 right (within the private market).⁶⁴

The second objective is economic, and it is to increase the availability of affordable housing in the private rental market.⁶⁵ The South African economy suffers from a shortage of residential accommodation, and, for nearly a century, the state has enacted numerous legislative schemes to ensure that the shortage of supply does not lead to exorbitant rentals. The earliest versions of rental control legislation imposed extensive restrictions on the contractual powers of lessors to increase rent.⁶⁶ In accordance with one of the predecessors of the RHA, for example, the rent amount of controlled residential premises were ‘frozen’ at a date in the 1950s and a lessor was only permitted to increase the rent in certain situations.⁶⁷ These situations included where there was an increase in property taxes, insurance costs, or the maintenance of the building.⁶⁸ The parties to a residential lease agreement were also permitted to apply to an administrative board for an order to either increase or decrease the rentals. The legislation provided a list of factors the board ought to consider in setting new rentals. The most pertinent was that the rent control legislation limited the landowner’s return on investment. The last

⁶³ Equality Act s 13(1)-(2).

⁶⁴ *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC) para 34. See also *Government of the Republic v Grootboom* 2001 (1) SA 46 (CC) para 35 (‘A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, but be enabled by legislative and other measures to provide housing’).

⁶⁵ ESTA pmb. See *S v Lawrence* 1997 (4) SA 1176 (CC) (courts are ill equipped to regulate economic matters).

⁶⁶ See Rent Control Act 80 of 1976; Rent Act 43 of 1950.

⁶⁷ Rent Act (n 66).

⁶⁸ *ibid* s 3(1)(b).

version of the rent control legislation provided that lessors could only receive a return of 8.5 per cent per annum on the value of the residential building and the land.⁶⁹

Government reassessed their strategy to the housing crisis, and concluded that rent control legislation deters private investment in the rental housing market. To promote the supply of rental housing, the RHA substituted rent control measures with a more flexible approach. In the opinion of government, the RHA creates a framework that assists in maximising two competing considerations: (i) the need to promote an increase of supply in the market and (ii) the need to ensure that rental accommodation is affordable, particularly for the poor and previously disadvantaged. In *Maphango*, the Constitutional Court summarised the objective of the RHA.

The Act abolished rent control legislation, but in its stead it enacted a more complex, nuanced and potentially powerful system for managing disputes between landlords and tenants. The system expressly takes account of market forces as well as the need to protect both tenants and landlords. Even-handedly, it imposes obligations on both. It is particularly sensitive to the need to afford investors in rental housing a realistic return on their capital. The statutory scheme is therefore acutely sensitive to the need to balance the social cost of managing and expanding rental housing stock without imposing it solely on landlords.⁷⁰

Chapter seven provided an overview of the RHA.⁷¹ The Act creates housing tribunals whose members must be persons with experience in property, housing development, and consumer protection. The tribunals are empowered to determine any new rental amount that is ‘just and equitable to both tenants and landlord’, which must take consideration of (i) prevailing economic conditions; (ii) the need for realistic returns on investments and (iii) policy frameworks on rental housing created by the cabinet minister responsible for the implementation of the RHA.⁷²

The *Maphango* court’s pivot towards legislative remedies allowed government policy to assist in resolving the dispute. This contrasts with the approach of the SCA, which confined its analysis to whether or not the Constitution demands the development of the common law of contract. The SCA answered the question in the negative, and

⁶⁹ Rent Control Act (n 66) s 1. The Rent Act (n 66) s 1 imposed more restrictive conditions. The rentals were not allowed to provide a return not exceeding either eight per cent per annum on the value of the building or six per cent per annum on the value of the land.

⁷⁰ *Maphango* (n 64) para 49.

⁷¹ See Chap 7, sec 4.3.

⁷² RHA s 13(4).

their reasons for doing so were built upon a laissez-faire economic assessment of the residential rental market that stood in stark contrast to the position of government. The SCA noted that the landlord engaged in the ‘commendable’ business practice of upgrading residential apartment buildings, and it could not be expected of an investor to incur losses in a situation where the landlord had the contractual power to terminate the agreements. This sort of reasoning found traction within the minority Constitutional Court judgment. Three judges of the court suggested that the soon-to-be evicted were to blame for their misfortune.⁷³ The minority judgment argued that the tenants could have negotiated, if they were more aware, more favourable terms for themselves (i.e. the tenants should have insisted that a clause be added to the agreement to the effect that the landlord was not entitled to cancel the lease agreement merely to increase the rent). This is a theoretical assumption of how liberal market economies operate; each individual is able to negotiate the best terms for the realisation of prized goods. But the facts of the case suggest that the tenants had little to no economic power to negotiate better terms. The strangest suggestion of the minority judgment was that the landlord may have also been at a disadvantage in terminating the lease agreement because the landlord would be losing ‘good tenants [who] are not always easy to get’.⁷⁴ In line with this liberal economic assessment of reasonableness, neither the SCA or minority judgment believed that the termination of lease agreements to increase the rent, or the fact that some of the tenants would be rendered homeless, was a factor to consider in the evaluation of whether the enforcement of the provision was unfair or unreasonable. The evaluation was also not considered from broader social and economic policy perspectives, including that the landlord received a financial grant from the state (the grant was provided as part of the state’s economic policy to ensure a sustainable and affordable rental housing market).⁷⁵

It is fair to criticise the SCA and minority judgment for grounding their decision on highly unrealistic assumptions of how agreements are created between powerful property owners and indigent residents. Their liberal microeconomic appraisal stands in stark contrast to social reality as well as the position of government (as reflected in the RHA which seeks to prevent landlords from exploiting poor tenants). But these judges

⁷³ *ibid* para 128.

⁷⁴ *ibid*.

⁷⁵ In *Sarrahwitz* (n 13) governmental policy influenced the balancing of interests. At paragraphs 33–39, the judgment records the principle reason for the legislature enacting section 22 of the Land Act. The legislature aimed to protect everyday home purchasers who invest a considerable portion of their assets and earnings into securing a home. The provision prevents financial hardship in the event that the seller of the estate becomes insolvent.

are fully aware of the political landscape in South Africa, and poor tenants are certainly not in a position to negotiate agreements. The most charitable explanation for these judgments is the concern that the common law cannot accommodate the objectives of socio-economic rights, and, more specifically, the common law does not have the tools to solve complex macroeconomic problems. Socio-economic rights and other economic matters are inherently about the redistribution of limited resources in society, which must be done through the formulation of policy objectives. This is a task that courts struggle to do within the narrow confines of individual common law disputes.⁷⁶

3.2 *State monitoring*

Government policy introduces an additional benefit. Unlike the courts, the elected branches of government enjoy the capacity to monitor and review the implementation of law.⁷⁷ In fact, under some circumstances, the state has the constitutional obligation to do so.⁷⁸ Oversight contributes to the institutional knowledge of the state, which, in turn, further enhances the capacity of the elected branches of government to appraise and formulate policy objectives and plans.

The legislature enjoys two ways to gain information on the effectiveness of a particular legislative scheme. First, the legislature can create internal oversight committees. Here, members of committees can invite (and, if need be, summon) individuals to provide evidence or produce documents.⁷⁹ Second, the legislature can create external oversight mechanisms that are tasked with providing feedback to Parliament and government. Most of the prominent constitutional rights legislative schemes follow the latter option. For example, section 32 of the Equality Act instructs the relevant cabinet minister to establish an Equality Review Committee (ERC). The membership of the ERC is composed of a senior judicial officer, the Chairpersons of the South African Human Rights Commission and the Gender Equality Commission, a

⁷⁶ See *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) para 43 (constitutional provisions cannot solve all problems overnight, which is partly due to limited resources). For further examples, see the Labour Relations Act 66 of 1995 (which gives effect to the section 23 constitutional right to fair labour practices of employees, employers, and trade unions; the creation of the Act stems from government policy created after consultation with both business and trade unions).

⁷⁷ Constitution s 55(2)(b)(i) (The National Assembly must oversee the implementation of legislation).

⁷⁸ See *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 40.

⁷⁹ Constitution ss 56, 69.

representative from civil society, an expert in the field of human rights, and one member from the National Assembly and National Council of Provinces. Section 33 outlines the responsibilities of the ERC, which includes submitting regular reports to the Minister advising on the operation of the Act and whether or not the objectives of the Act and the Constitution have been achieved. The ERC is also tasked with making recommendations on how to improve the operation of the Equality Act. The Information Act also relies upon an external oversight institution. The newly created Information Regulator is scheduled to takeover the responsibilities of the Human Rights Commission in respect of the Information Act, and is mandated to provide written recommendations to the National Assembly on how to improve the effectiveness of the Information Act.⁸⁰

3.3 *The limited role of policy within judicial law-making*

All law stems from policy. That is, lawmakers must firstly identify objectives that must be met and secondly determine how human behaviour needs to change in order to meet those objectives.⁸¹ The constitutional rebuilding project of private law thus requires the setting of objectives (the Constitution identifies broad objectives, but more specific goals need to be tailored), and also entails the making of evaluations and reasonable assumptions of how individuals interact and societies function. And this is a task that must be fulfilled by legislators and judges alike. However, in contrast to the elected branches of government, the ability of the judiciary to appraise evidence and formulate policy is limited. As the SCA held in the context of a housing eviction dispute, even though courts are required to assess all relevant considerations, the capacity of the courts to gather and evaluate evidence is restricted:

courts are neither vested with powers of investigation nor equipped with the staff and resources to engage in broad-ranging enquiries into socio-economic issues. Nor, [...]

⁸⁰ See Information Act ss 82–84, and the amendments introduced by the Protection of Personal Information Act 4 of 2013. For further examples, see Prevention of Combating of Trafficking in Persons Act 7 of 2013 (the Act gives effect to the rights of human dignity, equality, and freedom and security of the person, and specifically mandates certain cabinet minister and other state institutions to report annually to Parliament on the implementation of the Act).

⁸¹ For a critique of the view that the common law is depoliticised and that its development is taken without consideration of socio-political forces, see Dennis Davis, *Democracy and Deliberation* (Juta 1999) 131.

can the courts circumvent that by delegating those tasks to the sheriff, who is likewise ill-equipped for that task.⁸²

The choice between the judicial and legislative law-making pathway therefore depends on whether or not the judiciary is capable of gathering and evaluating the evidence that is necessary to resolve a dispute, including whether the evidence leads to one outcome or a multiplicity of options as the courts are unlikely to develop the law of their own accord if the latter ensues.⁸³

The *Ramakatsa* decision illustrates the role of policy in the judicial law-making process. More specifically, the judgments highlights how the courts can exercise the law-making mandate effortlessly when the constitutional objectives are clear and there is a sufficient amount of certainty over how to change individual behaviours in order to achieve the result. Recall that the Constitutional Court only recognised a procedural right of members to participate in the internal activities of a political party. This right was necessitated to realise specific constitutional goals. In a narrow sense, protecting the participation of individual members in a political party serves the procedural requirements of the Constitution that government must be based on a ‘multi-party system of government’.⁸⁴ The text prescribes that national and provincial legislatures must generally be composed of proportional representation.⁸⁵ In doing so, the Constitution effectively makes political parties gatekeepers to elected office. The supreme law forces any citizen wishing to stand for public office to exercise this constitutionally guaranteed franchise through the internal operations of political parties. Furthermore, as a constitutional court judge explains, the—

citizens’ right to participate in the activities of a political party is the route by which any citizen would, in a real way, be able to bring influence to bear on the way that representative performs her functions in the relevant legislature. In this sense the right

⁸² *City of Johannesburg v Changing Tides* 2012 (6) SA 294 (SCA) para 26.

⁸³ *Paulsen v Slip Knot Investments* 2015 (3) SA 479 (CC) para 57 (courts should steer away from making decisions when ‘public policy considerations do not chart the path of desired common law development with sufficient clarity’; in these instances, the role of law-reform is best left to the legislature).

⁸⁴ Constitution s 1(d).

⁸⁵ *ibid* ss 46(1)(d), 105(1)(d).

places an obligation on political parties to ensure that they take account of what members say within their structures.⁸⁶

In a broader sense, the reasoning of the *Ramakatsa* judgment reveals that the Constitutional Court believes that fostering conditions for the active participation between party members is a way to improve the quality of democracy.⁸⁷ Internal party democracy not only aids in curtailing the authoritarian practices of the past. The court held that the success of any political party depends on the quality of the policies it seeks to sell to the general electorate, and suggests that the constructive participation of every member is needed to ensure that these policies are able to respond effectively to the many economic and social issues facing the country.⁸⁸ Participation also promotes political stability. It requires members to tolerate dissenting views. Access to political decision-making structures reduces the need for persons marginalised in the political process to resort to violence and other non-democratic means to advance their interests in a community.

It should also be noted that the obligation upon political parties is not particularly onerous. The right does not entitle party members to a specific sort of process, and every political party is free to decide how best to facilitate participation.

Section 19 of the Constitution does not spell out how members of a political party should exercise the right to participate in the activities of their party. For good reason this is left to political parties themselves to regulate. These activities are internal matters of each party. Therefore, it is these parties which are best placed to determine how members would participate in internal activities.⁸⁹

The decision of the court not to prescribe a more specific procedure is not coincidental. The non-onerous obligation also seeks to achieve (or prevent) certain results. Three are mentioned. First, imposing requirements that are too burdensome can prove detrimental and counter-productive to the effective operation of a political organisation. The success of any political party is contingent on a certain level of discipline from its members. The branding of a political party is lost on the general electorate if the participation mechanisms produce a multiplicity of conflicting messages.

⁸⁶ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 278 (Yacoob J).

⁸⁷ See generally *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC) para 43.

⁸⁸ *Ramakatsa* (n 13) para 66.

⁸⁹ *ibid* para 73.

Second, political parties are based on mutual trust and respect amongst its membership. No law can legislate this condition, and any imposed rule that seeks to do so can frustrate the operations of the party. Third, while political parties trade in ideas, the machinery required to advance those ideas is expensive. Political parties are difficult to build and sustain. They require an immense amount of assets and knowledge to build a reputation in society and wage an effective campaign for government. The high costs associated with the establishment of a mainstream political party requires protection. It should also not be forgotten that internal party democracy and participation is expensive, and regulation would adversely and disproportionality impact newcomers and smaller parties who often haven't managed to secure the financial resources and capacity to facilitate participation. Added to all these concerns, the fact remains that there is no clear consensus amongst political scientists and social theorists about what exactly constitutes acceptable levels of internal party democracy; what are the exact objectives of participation and providing ordinary members a voice against party leaders; and how are these objectives how best achieved. With these uncertainties, it is best for the law to provide each party with a high amount of autonomy. In the end, it is political parties (and not legislators or courts) that are best placed to advance and protect their own interests.

In sum, the *Ramakatsa*'s decision to recognise a procedural right was informed by a series of constitutional objectives. These policies are also complex, and are determined by the judicial appraisal of experiences and assumptions of how society operates. But the outcome of that policy — that is, a procedural right — could be incorporated into the common law without significant disruption or difficulty. The *Ramakatsa* decision serves as an example of where the larger capacity and expertise of the government's policy-making toolkit would be of no material advantage to the project of rebuilding private law, because, as the judgment leads one to believe, the court believed it was sufficiently capable of understanding how human behaviour impacts the realisation of the constitutional objectives.

4 Benefit three: legislation clarifies the obligations of the state

A defining feature of the judicial balancing process is that it seeks to consider all of the relevant factors of a case before resolving a clash of competing rights. And, as the following section will illustrate, one of these factors is sometimes the actions and constitutional duties of the state. But this introduces a problem for the judicial balancing process. The constitutional development of the common law is usually performed in disputes where all the litigants are private individuals and entities. The state is typically not a party to private common law cases, and, as a result, little to no consideration is given to the constitutional obligations of the state when the courts exercise their law-making mandate under the horizontal application provisions. The role of the court is confined to determining whether or not a private individual or entity should be burdened with an obligation to safeguard the constitutional interests of another. This enquiry is forced to become independent of state duties and actions, which can lead to one of two undesirable situations. First, the courts could undervalue the scope of private obligations. If there is uncertainty over the scope of the state's responsibilities, the courts may be less inclined to recognise an obligation upon private individuals and entities. For the reasons that follow below, the cases discussed in chapter six is an example of this occurrence. Second, the courts could overvalue the scope of the private obligation. In an attempt to ensure the full protection and realisation of a constitutional right, the courts could inadvertently transfer the obligations of the state onto private individuals and entities.

The adjudication of constitutional disputes within legislative frameworks mitigates this limit of the judicial law-making toolkit. This is on account of the fact that constitutional rights legislation not only gives effect to the obligations of private individuals and entities, but it also delineates the obligations of the state, or, at the very least, prescribes frameworks for determining the extent of the state's obligation within a particular case. In sum, the legislative framework is better at clarifying the obligations of the state, which, in turn, allows the courts to be more accurate and consistent in articulating the scope of the obligation upon private individuals and entities within the context of a particular case.

4.1 *State obligations inform private obligations*

The case law discussed in chapter six illustrates how the scope of certain constitutional obligations upon private individuals and entities sometimes depends on the constitutional duties and actions of the state. In these cases, the central question for determination was whether or not private property owners should incur constitutional obligations (and therefore restriction on their common law property rights) to ensure that indigent persons are not made homeless. When this question was raised within the common law framework, the courts repeatedly said no. The application of the narrow-procedural reading of the obligation made clear that it was the state that remains solely responsible for providing adequate housing to those who cannot afford to secure this resource through their own means.⁹⁰ The obligation to provide housing cannot be passed off to private individuals and entities through indirect means, and private property rights cannot be limited to assist the state in meeting the obligation.

The answer changed however when the obligations of private individuals and entities were assessed within legislative schemes. The scope of the private obligation grew, and, as a result, the courts were more inclined to hold that private property rights had to be limited in order to safeguard another's access to existing housing. Its bears highlighting that the Constitutional Court view of the constitutional obligation upon private individuals and entities did not change. The court repeatedly held that it is only the state that is vested with a positive obligation to provide access to adequate housing to those who cannot afford to do so by their own means, and the purpose of imposing a constitutional obligation on private individuals and entities is not to obstruct private autonomy or to transfer or pass-off the obligations of the state onto private individuals and entities.⁹¹ What did change however was that the private obligation was interpreted and applied within a broader legislative scheme, a legislative scheme that delineated the duties of the state. In other words, these private duties operate as support to the primary obligations of the state.⁹²

⁹⁰ Constitution s 26(2).

⁹¹ *Governing Body of the Juma Musjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 58. See also *Modderklip* (n 51) para 44. Compare *Daniels* (n 47) paras 39; *All Pay Consolidated Investment Holdings v Chief Executive Officer of the South African Social Security Agency (No. 2)* 2014 (4) SA 179 (CC) (discussed in Chap 5, sec 5.2.)

⁹² See *City of Johannesburg v Blue Moonlight Properties* 2012 (2) SA 104 (CC) paras 97–100, read with *Maphango* (n 64) paras 32–33.

This offers an explanation as to why the amorphous scope of the expanded-substantive reading of the private obligation is difficult to define. The private duty stems from the positive component of the state's socio-economic rights, which the courts have been unwilling to prescribe concrete duties. In brief, the positive duty upon the state to provide adequate housing to those who are unable to secure the resource on their own means is subject to the qualifications stipulated in section 26(2). The state is required to only take 'reasonable' measures that are 'within its available resources' to achieve the 'progressive' realisation of the right. In the opinion of the court, these qualifications dissuade against a minimum core interpretation.⁹³ This obligation demands that the state design and implement a housing policy, which, amongst many other things, must make provision for temporary emergency housing in order to house individuals who are at risk of losing access to their home.⁹⁴ Members of the judiciary are thus expected to decline any invitation to calculate a fixed and quantified set of minimum entitlements, instead allowing the elected branches of government to delineate the specific content of the right.⁹⁵ The state is left to define what constitutes an adequate house, as well as the means through which this resource is realised. And the role of the courts is confined to testing whether the state's housing policy, including the definition of an adequate house, is reasonable. As the scope of the section 26 obligations of private individuals and entities are informed by and dependent on the flexible and changing obligations and action of the state, it means that the exact scope of private obligations cannot be fixed and will also remain in a state of flux.

The Constitutional Court decision of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* illustrates the triangular relationship.⁹⁶ A private property owner instituted an application under the Eviction Act for the removal of 86 unlawful occupiers from a dilapidated building located in the City of Johannesburg. The corporate owner purchased the property with the aim of renovating the building, and argued that it could not be expected to house the occupiers. The occupiers resisted the application, and contended that it would be neither just nor equitable in the circumstances to grant an order for their eviction. They were financially vulnerable, and would become homeless if they were to be evicted. The occupiers joined

⁹³ See *Mazibuko* (n 78) para 66.

⁹⁴ See *Grootboom* (n 64) paras 40–46, 68; *Blue Moonlight* (n 92) paras 67, 69, 74.

⁹⁵ *Mazibuko* (n 78) para 66.

⁹⁶ *Blue Moonlight* (n 92).

the city to the proceedings with the aim that they could provide a solution, but the city too held that it was not legally obliged to provide alternative accommodation to the occupiers. The city relied on their housing policy to support this submission. The housing policy requires the city to provide housing assistance to vulnerable individuals who find themselves in a housing emergency for reasons that were beyond their control. But, importantly, the policy extended these benefits only to individuals who were evicted from state-owned land.

A unanimous Constitutional Court held that the city's inflexible housing policy was unconstitutional. The Constitutional Court cited their seminal ruling of *Grootboom* which held that a housing programme that fails to meet the basic needs of the most vulnerable in society is unreasonable, and, therefore, unconstitutional.⁹⁷ The court found that many of the occupiers in this matter were amongst the most financially vulnerable in society. In assessing the reasonableness of this policy, the court concluded that it should make no difference as to whether the occupiers were evicted from private- or state-owned buildings. The decision of the city to exclude privately evicted occupiers from benefiting from temporary emergency housing was unlawful, as the city's housing policy was constructed on an incorrect interpretation of the national housing policy.⁹⁸

After declaring the city's housing policy unconstitutional, the court returned to the eviction application. The court concluded that the eviction of the occupiers would be just and equitable under the Eviction Act if the state provides the occupiers with temporary emergency accommodation. The city was not in a position to provide the accommodation immediately, and the court recognised that the city must be given time to relocate the occupiers. The court provided the state four months to do so. The court recognised that this did constitute a deprivation of property, but that property rights must be interpreted within a constitutional framework that eviction must be just and equitable.

Although [private property owners] cannot be expected to be burdened with providing accommodation to the Occupiers indefinitely, *a degree of patience* should be reasonably expected of it and the City must be given a reasonable time to comply.⁹⁹

⁹⁷ *ibid* paras 88–95.

⁹⁸ *ibid* para 95. The city was unable to demonstrate that it lacked the financial means to accommodate occupiers evicted from private property. It bears noting that *Blue Moonlight* reflects *Sarrahwitz*, which similarly held that it was unconstitutional for the state to afford housing benefits to one group and not another in the absence of a compelling justification.

⁹⁹ *ibid* para 100 (emphasis added).

The ‘degree of patience’ that private property owners were required to show was viewed as a justifiable limitation of the section 25 right not to be arbitrarily deprived of a property in this matter.¹⁰⁰ Though the *Blue Moonlight* read the ‘degree of patience’ as a justifiable limitation upon the property right, subsequent Constitutional Court decisions read this limitation as also flowing from the obligations upon private individuals in accordance with section 26 of the Constitution.¹⁰¹ Although the ‘degree of patience’ is framed as a negative obligation, it has crystallised into two duties that have curtailed common law rights.¹⁰²

- *A duty to engage.* *Port Elizabeth Municipality v Various Occupiers*¹⁰³ is the leading case on the Eviction Act. Here, occupiers settled on private property, and, on behalf of the landowner, the state initiated an application for their removal. The Constitutional Court held that the extent to which the state engaged with the unlawful occupiers to find a solution is one of the relevant factors that courts should consider before granting an eviction order. The failure to engage with the aim of finding alternative accommodation would normally result in the refusal of an eviction order. Since this judgment, some high court judgments (though most certainly not all of them) have applied this requirement to private landowners seeking an eviction.¹⁰⁴ At the very least, there is a duty on private landowners to join the municipality to the eviction application to ascertain the availability of alternative accommodation.¹⁰⁵ The case law under ESTA also shows that meaningful engagement between landowners and occupiers is a highly relevant

¹⁰⁰ For further examples, see *Occupiers of Skurweplaas v PPC Aggregate Quarries* 2012 (4) BCLR 382 (CC) paras 11–13; *Occupiers of Mooiplaats v Golden Thread* 2012 (2) SA 337 (CC) paras 17–18 (in both matters, the court concluded that it was just and equitable to delay the granting of an eviction order from private property to afford the state an opportunity to provide alternative accommodation; a highly relevant factor in both cases was that the private property owner did not intend to use the property within the near future). See also *Changing Tides* (n 82) para 16.

¹⁰¹ See *Maphango* (n 64) paras 33–34; *Daniels* (n 47) para 53; *Baron* (n 33) paras 40–42. Compare the minority judgment in *Daniels* (n 47) para 177.

¹⁰² This analysis is adapted from Michael Dafele, ‘The Negative Obligation of the Housing Right’ (2013) 29 *SAJHR* 591, 608–13.

¹⁰³ 2005 (1) SA 217 (CC).

¹⁰⁴ *Lingwood v The Unlawful Occupiers of R/E of ERF 9 Highlands* 2008 (3) BCLR 325 (W); *Davidson v Van Straaten* (2005) 4 SA 468 (C). For the obligation upon the state to engage, see *Ngomane v Govan Mbeki Municipality* 2016 (12) BCLR 1528 (CC) para 14; *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (3) SA 208 (CC) para 15.

¹⁰⁵ *Baron* (n 33) paras 61–62.

consideration, and the courts will usually dismiss an eviction application if engagement has not occurred.¹⁰⁶

- *A burden to incur a financial loss or forfeit gain.* The case law on private property v housing rights shows that there are conditions under which a private landowner is required to incur a financial loss or forfeit a gain in order to safeguard another's right to access adequate housing. But whether this financial burden is recognised depends on the particular circumstances of the case, including whether the state is able to accommodate the occupier. For example, the case law on debt enforcement recognised that financial institutions may in some instances be required to incur a financial loss and perhaps even forego a mortgaged asset.¹⁰⁷ The eviction case law also allows for financial loss. As the court held in *Blue Moonlight*, the property owner was required to provide housing for a temporary period until the state was able to provide alternative accommodation. In addition to having the duty to continue housing the occupants, the practical effect of this ruling was that the owner was unable to receive rent until the state was in a position to provide alternative housing.¹⁰⁸ A case adjudicated under ESTA offers a final example. In *Daniels v Scribante*, the Constitutional Court was called upon to determine whether or not an occupier was entitled to renovate her home without the permission of the landowner.¹⁰⁹ The occupier sought to improve the habitability of the dwelling (e.g. levelling floors, installing an indoor water supply, windows), and was prepared to bear the costs of the renovation. The landowner refused. Before the court, the landowner argued that ESTA cannot compel a private property owner to tolerate renovations. This would tantamount to a positive obligation upon landowners to provide access to adequate housing, because, in the event that the occupier leaves the land, the landowner would be required to compensate the occupier for the improvements. The Constitutional Court accepted that this would amount to a financial obligation upon the landowner, but, the court continued, the Constitution

¹⁰⁶ See *Daniels* (n 40); *Hattingh v Juta* 2013 (3) SA 275 (CC).

¹⁰⁷ See *Gundwana v Steko Development* 2011 (3) SA 347 (CC); *Jaftha v Schoeman* 2005 (2) SA 140 (CC).

¹⁰⁸ See also *Baron* (n 33) para 49.

¹⁰⁹ *Daniels* (n 40).

does not bar such an outcome.¹¹⁰ Under ESTA, the courts enjoy discretion as to whether or not to order compensation for unauthorised improvements.

4.2 *Legislative intervention can be undesirable*

In most of the cases litigated under the horizontal application provisions the scope of the private obligation did not directly depend on the obligations or action, and, as a result, there was no need to pivot towards legislation in order to gain clarity. *Ramakatsa* is an example of such a situation because the duty upon political parties to facilitate participation is not dependent or effected by state actions or responsibilities.

In fact, *Ramakatsa* illustrates an example of where it is desirable to exclude the state from regulating the matter (or at least subject the state's actions to a heightened degree of scrutiny), which in turn necessitates the need for the courts to regulate the matter. In a constitutional democracy, one of the primary responsibilities of the judiciary is to police political debate and the electoral process. Owing to the vested interests of the elected branches of government, the courts must ensure that political forces do not manipulate the electoral market. In essence, the judiciary is the best-suited institution out of the three branches of government to regulate political participation. In the fulfilment of this role, the South African Constitutional Court believes that is necessary to ensure that political rights are given the widest protection possible. It is a common mantra of the court to suggest that electoral and political participation laws must be interpreted in 'favour of enfranchisement rather than disenfranchisement and participation rather than exclusion'.¹¹¹ Often against the intention of the legislature, the Constitutional Court increased the political participation of individuals in society. It has, for instance, extended the right to vote to prisoners and citizens living abroad, and demanded that the legislature facilitate effective public participation and consultation before enacting legislation. When viewed from this perspective, the decision of *Ramakatsa* is in line with other political rights cases that sought to expand political participation and strengthen the institutions that advance democracy.¹¹² As the contestation of political ideals occurs not only in the legislatures but also within political parties, burdening political parties with

¹¹⁰ *ibid* paras 39–53.

¹¹¹ *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) para 23. See also *Electoral Commission of the Republic v Inkatha Freedom Party* 2011 (9) BCLR 943 (CC) para 37; *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) para 55.

¹¹² Samuel Issacharoff, *Fragile Democracies* (CUP 2015) 255–56, 263.

this obligation is merely an extension of the judicial function to improve meaningful political participation.

THE PIVOT IS...

This concluding chapter connects the core arguments of this dissertation, and does so to provide an explanation for the pivot towards legislative remedies.

1 In search of an explanation

The judicial rebuilding of private law is a consequence of state inaction. The duty upon the courts to develop private law in accordance with constitutional right norms only arises if legislation fails to provide adequate relief. In nearly all of the cases discussed in this dissertation — though there are a few exceptions — the judiciary only exercised their law-making powers under the horizontality provisions because the elected branches of government had yet to promulgate laws capable of vindicating an infringed constitutional right norm. In the event that Parliament had done so, the courts would have been expected to apply the enacted legislative scheme and refrain from creating a parallel pathway to the same remedy.¹ The primacy of statutory remedies over judicially created law is of course a familiar practice within the tradition of the common law. Our earliest law reports document that the courts have always viewed their power to apply and further develop the common law as conditional on legislative reticence.² And nothing in the text of the Constitution alters the residual role of judge-made law. On the contrary, the

¹ See *De Lange v Presiding Bishop of the Methodist Church* 2016 (2) SA 1 (CC) paras 51–53; *Sali v National Commissioner of the South African Police Service* 2014 (9) BCLR 997 (CC) para 4; *Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC) paras 55, 152; *Minister of Health v New Clicks* 2006 (2) SA 311 (CC) paras 96–97, 436; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40.

² See *Tsewu v Registrar of Deeds* 1905 TS 130, at 135–36.

horizontal application clause confirms the subordinate status of common law. Whenever a constitutional right is held to bind a natural or juristic person, section 8(3)(a) of the Constitution instructs the courts to develop the common law only ‘to the extent that legislation does not give effect to that right’.

The Constitutional Court has however read the horizontal application provisions to incorporate a degree of flexibility. Presumably premising their authority on section 172(1)(b) of the Constitution — which grants the judiciary the power to make any order that is just and equitable when deciding a constitutional matter — the court has at times opted not to develop the common law and rather to pivot towards legislative remedies. What is the best possible explanation for the pivot? This chapter answers this question in two parts. The first summarises a commonly recited explanation, but proceeds to demonstrate why this explanation fails to offer a complete and compelling account. The second part proposes an alternative explanation, one that flows from this dissertation’s analysis of the case law.

2 ...not an act of deference

The explanation most often narrated within the law reports and journals is that the judicial development of the common law in accordance with constitutional right norms must take place on an incremental basis and in line with its own internal logic. In other words, the constitutional development of private law must continue to follow the same pattern and pace as had been the situation prior to the enactment of the Constitution. Judicial restraint, so the argument concludes, has the benefit of allowing the legislature (and not the courts) to assume the primary and more active role in the law rebuilding project.³ The pivot towards legislative remedies is thus an act of comity in favour of the legislature’s law-making role, which is a line of argument that invokes theories of judicial deference. Although there is no universal definition of judicial deference, most of them converge on the notion that courts should defer their own constitutional powers whenever the elected branches of government enjoy a better set of institutional competencies to produce a more accurate outcome (or, at the very least, a more suitable procedure to arrive at an outcome).⁴ And, at first glance, it may be tempting to surmise that the South African

³ See *Mighty Solutions v Engen* 2016 (1) SA 621 (CC) para 38; *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC) para 31; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 60.

⁴ Katharine Young, ‘A Typology of Economic and Social Rights’ (2010) 8 *ICON* 385, 392.

Constitutional Court has in fact deferred some parts of its constitutional mandate. The three benefits of rights legislation identified in the proceeding chapter — namely, legislative balancing is better structured, contains government policy, and clarifies the obligations of the state — are all benefits that arise due to the better position of the legislature to reconcile competing rights and other public interests.

On closer inspection, however, the supposition of judicial deference proves weak. For starters, the explanation starts with a premise that is constitutionally strained. The constitutional development of private law cannot depend on whether the exiting principles and rules of the common law can accommodate constitutional norms.⁵ That would lead to an absurd result: the ability of a litigant to safeguard their constitutional rights against private individuals and entities would depend on the often fortuitous way in which the common law had developed over centuries in Europe and apartheid South Africa.⁶ While it is true that the constitutional rebuilding of private law mostly takes place within the common law, it should not be forgotten that it is the Constitution that controls private law and not the other way round. All law derives its validity from the Constitution, and it is the courts that are ultimately entrusted as the final arbiters as to whether or not any subordinate source of law is out of sync with the commands and principles of the supreme law. And, to the extent that they do not match, the courts must exercise their responsibility to invalidate and rebuild laws. A litigant is entitled to any remedy guaranteed by the Constitution unless there is a compelling government interest at jeopardy.⁷ The fact that the legislature serves as the primary institution responsible for law reform is certainly not a compelling justification given that Parliament retains at all times the authority to overwrite judge-made law, provided of course that any legislative revision to the common law complies with the Constitution.⁸

The shaky ground upon which this explanation of judicial restraint rests is probably the reason the courts have applied it so inconsistently.⁹ The handful of cases

⁵ See chap 1, sec 2.2; chap 3, sec 1; chap 4, sec 1; chap 8, sec 1.

⁶ See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 68 (the argument was originally made in the context of legislation, but the principle applies to the common law as well: a constitutional remedy cannot depend on the way subordinate sources of law develop).

⁷ *S v Bhulwana* 1996 (1) SA 388 (CC) para 32; *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 170.

⁸ *Paulsen v Slip Knot Investments* 2015 (3) SA 479 (CC) para 116.

⁹ See chap 4, sec 3.

that cite the ‘primary role of the legislature’ to justify judicial inaction stand in contrast to the greater volume of cases where the Constitutional Court effectively ignored the role and preferences of the legislature. Consider the decisions of *AllPay*, *Ramakatsa*, and *Botha*. The court not only introduced fundamental changes to private law, it did so in a manner that defied legislative policy.

The argument that the pivot is not an act of judicial deference gains further tractions when one considers that the courts are unlikely to permit the legislature the freedom to exclude relevant considerations from a balancing framework of competing rights, unless the state can identify a compelling government interest. The preceding chapter showed why: sections 36(1) (the rights-limitation analysis), 39(2) (interpretation clause), and 172(1)(b) (just and equitable remedies) promote judicial discretion in constitutional rights legislation, and, in doing so, constrain the law-making powers of the legislature.¹⁰ A discernable pattern has thus emerged from the case law of the Constitutional Court and the Supreme Court of Appeal: through either statutory interpretation or judicial review: the courts have prohibited the legislature from outright excluding a constitutionally protected interest unless a compelling state justification requires otherwise. In other words, through statutory interpretation or judicial review, the courts ensure that the defining characteristic of the judicial balancing process is replicated within rights legislation.

3 ...a strategy to enhance the (judicial) balancing process

This dissertation’s analysis of the case law leads to an alternative explanation. The constitutional rebuilding of private law turns on the balancing of constitutional right norms. And, to this end, the Constitutional Court has adopted the judicial balancing process as the main law-making framework. The process steers away from fixed and absolute rules, and rather encourages the judicial evaluation of all relevant facts and circumstance of a case before determining the prevailing interest.¹¹ The process ultimately aims to reconcile two competing considerations, which this dissertation has presented as the internal conflict within rights. On the one hand, there is the need to protect the freedoms safeguarded by constitutional right norms. On the other, there is the

¹⁰ Chap 8, sec 2.2.1.

¹¹ Chap 4.

need to ensure that the exercise of private power (which is ordinarily protected by right norms) does not unduly and without adequate justification infringe upon the constitutional rights of another.¹²

Constitutional rights legislation replicates the defining characteristic of the balancing process. For the reason summarised above, rights legislation also steers away from fixed rules opting instead for flexible balancing exercises that permit judicial evaluation and discretion. Yet, despite this similarity, there are noteworthy differences. This dissertation identified that the balancing exercises prescribed in rights legislation tend to contain three beneficial features that are likely to be absent or limited in the judicial balancing process.

- First, the framework for balancing conflicting rights within legislation is more structured — that is, legislation is more detailed and precise — than the judicial balancing process. This benefit is partly due to the fact that the legislative law-making toolkit is far bigger than the judicial one. The legislative law-making process benefits from public participation, government policy, and arbitrary line drawing. The better structure is also on account of the fact that the legislature is forced to create frameworks that are sufficiently detailed so as to resolve all possible disputes that may fall within the purview of a legislative scheme. The legislature does not enjoy the luxury of tailoring laws on an ad hoc basis to ensure the realisation of policy, which is an option within common law adjudication.¹³
- Second, legislation incorporates the policy direction of the state, which is needed for the full realisation of those constitutional provisions that depend on the formulation of economic and social policy. In contrast, the judicial law-making toolkit contains neither the expertise nor the full capacity to facilitate this objective.¹⁴
- Third, legislation better defines the constitutional obligations of the state, which is a feature that aids in (i) defining the obligations of private individuals and entities

¹² Chap 5, sec 5.4.

¹³ Chap 8, sec 2.

¹⁴ Chap 8, sec 3.

and (ii) limiting the adverse impact the application of constitutional rights may otherwise have on the autonomy interests of private duty bearers.¹⁵

In the end, it is prudent to heed the wisdom of the Constitutional Court not to prescribe fixed rules for determining when to choose legislative remedies over judicially created ones.¹⁶ Doing so would undermine the intentional design of the Constitution, which, in turn, would limit the full law-making capacity of the Constitution to rebuild private law. This dissertation nevertheless provides some indicators as to when legislative remedies are more desirable. If most of the enhanced benefits of the legislative process are present, and the political bias inherent within the legislative law-making process is not a significant threat to realising the constitutional right, then there is a strong argument for pivoting towards legislative remedies. There is however little justification for seeking out new legislative remedies if such legislation would offer no appreciable enhancement on the judicial balancing process.

The pivot towards legislative remedies is thus best explained as a strategy to enhance the judicial balancing process, as it allows for the constitutional rebuilding of the South African private law in a way that the judiciary is unable to do on its own. From this perspective, the judicial law-making process produces the floor of the rebuilding project and the legislative law-making process enhances that framework.

¹⁵ Chap 8, sec 4. It requires noting that a claim of judicial deference seems strange if the courts do not enjoy the legal power or capacity to reach a particular outcome.

¹⁶ *C v Department of Health and Social Development* 2012 (2) SA 208 (CC) paras 43–44; *National Council for Gay and Lesbian Equality* (n 6) para 66.

POSTSCRIPT

I wish to note the reasons I believe this PhD dissertation advances a new and important contribution to learning.

The research topic — and, more specifically, the research question — falls within an underexplored area of the literature. Chapter one explained that most of the scholarship to date has focused on the law-making role of the courts, with the function of the legislature confined to the periphery of the analysis or completely ignored. And, to my knowledge, this dissertation stands as the first major research project to investigate the relationship between the two main law-making institutions in respect to the horizontal application of constitutional rights in South Africa. The shortage of academic writing suggests that it is near inevitable that a good and extensive analysis of relevant laws will produce an original conclusion. My hope is that this dissertation has done so. Chapters eight and nine reject a commonly recited explanation for why the courts should refrain from exercising their law-making powers in favour of the legislature when rebuilding private law. The final two chapters instead offer a new explanation, one that is both constitutionally defensible and grounded within the analysis of the case law.

Should the final conclusion be unconvincing, however, I am of the view that the individual components of the dissertation continue to stand as original and helpful pieces of academic writing.

Chapter two provided a historical account of how the drafters of the interim and final Constitution negotiated and formulated the horizontal application provisions. Although there are a few descriptions of the negotiation process — and most of these cover only the interim Constitution — this dissertation turned the spotlight to events that have remained underappreciated. The most significant is the counter-intuitive finding that the horizontal application of rights was initially advocated as a means to protect the law-making powers of the legislature. This discovery unscrambles two mysteries, which have yet to be solved in the literature. The drafting history illuminates why the drafters settled on two horizontality provisions, and why the section 8 application clause is formulated in a somewhat awkward and convoluted manner. Recording a narrative of

this significant time period in South African history is useful in and of itself. But there is of course a further question as to whether or not drafting history is a valid source of legal interpretation. My preference is that history should have an impact on the way we read our Constitution, although it should never assume a conclusive or incontrovertible role. The use of drafting history allowed this dissertation to underscore the conclusion that our supreme law formulates no comprehensive judicial law-making framework. The drafting history also strengthened the argument advanced in later chapters that there is little utility in maintaining a distinction between direct and indirect application. These theoretical models were imported from foreign jurisdictions, and, within a South African context, they are confusing and arguably pointless.

Chapter three argued that the balancing exercise in horizontal application disputes is dissimilar from the balance exercise undertaken during the review of legislation. Though this dissertation is not the first to identify that there is a difference of some sort, I am unaware of any other scholarly writing that comprehensively articulates why the assumptions that underlie the rights-limitation analysis are not present in horizontal application disputes. This finding is noteworthy because it consequently necessitates the design of new or modified methodologies that are capable of resolving conflicting rights in private disputes. This is what chapters four and five set out to do.

Chapter four theorised the existence of a balance process. This represents the first scholarly description and defence of a general framework that indicates how the South African Constitutional Court adjudicates horizontal application disputes. The chapter's analysis of the law also clarified points of law. Two are mentioned here. First, the chapter offered a modified view of how the Constitution impacts contract law. The analysis split the public policy enquiry into the intrinsic- and extrinsic-prong of the test, which I believe provides clarity on the operation and scope of the test. Second, the analysis introduced a distinction between process and outcome-based balancing. These two concepts show that judicial balancing is an inevitable path in constitutional adjudication, and, as demonstrated in chapter eight, these two concepts are useful for evaluating how discretionary or fixed any particular balancing exercise is.

Chapter five postulated that constitutional right norms are internally conflicting. That is, adjudicators must reconcile the need to protect a freedom against the need to ensure that the freedom is not exercised in a way that unduly impairs the freedoms of others. This idea led to the imagining of a power-freedom curve, which is a graph that

sketches how these two competing interests are weighted. The power-freedom curve ultimately provided an original explanation for how courts manage to negate one of the core criticisms directed against horizontality (i.e. horizontality undermines the autonomy interests that constitutional rights are meant to protect).

The two cases studies were partly chosen because they had yet to receive a full analysis in the literature. Chapter six examined the negative component of the access to adequate housing right, and, in doing so, documents a highly unusual practice of the courts to alter the scope of a constitutional right depending on whether the dispute is adjudicated within a common law or legislative framework. The chapter is the first piece of writing to describe a strategy of the South African Constitutional Court to pivot away from the common law towards legislative remedies. Chapter seven focused on the right to participate in political parties. Although the South African law journals have recently started to examine the position and role of political parties within our constitutional democracy, it is my understanding that chapter seven is the first academic study to survey pre- and post-Constitution case law to demonstrate how — and explain the reasons as to why — the law has shifted in the way it regulates internal party democracy.

I suppose the hallmark of good legal scholarship is that which attracts further engagement, even if that comes in the form of critical retorts. I hope that my dissertation has set out a sufficiently new and cogent account of the law, upon which I — and, hopefully, others — can continue to build.

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